

Ombudsman's Determination

Applicant	Mrs L
Scheme	NHS Pension Scheme (the Scheme)
Respondents	National Health Service Business Services (NHSBSA)

Outcome

1. I do not uphold Mrs L'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 L is complaining that she was unfairly deprived of her entitlement to special class status (**SCS**) in the Scheme, due to changes that were introduced in March 1995, when she was a deferred member.
4. Mrs L also claims her entitlement to SCS should be reinstated, because she was not informed of the changes in time to take steps to mitigate her loss.

Background information, including submissions from the parties

5. On 6 May 1981, Mrs L began working for the NHS as a trainee nurse. She joined the Scheme, with entitlement to SCS, that applied to permanent nursing staff.
6. as a member with SCS, in accordance with the regulations in force at the time¹, she could retire with a full pension from age 55, provided she had completed five years' continuous pensionable service at her retirement date. Other Scheme members had a normal retirement age (**NRA**) of 60.
7. Mrs L was subsequently employed as a nurse in various pensionable roles within the NHS until 27 February 1988, when she left Basildon Hospital, on maternity leave.
8. She became a deferred member and her NRA reverted to 60. However, she retained a potential entitlement, through SCS, to retire at age 55, if she returned to pensionable employment in the NHS, in the future.

¹ The National Health Service (Superannuation) Regulations 1980 (Revoked) (SI 1980/362)

9. Mrs L says she checked the 1987 Scheme booklet when she left the Scheme. This confirmed she was entitled to retire on full pension at age 55, provided she returned to NHS pensionable service and fulfilled all other conditions.
10. On 4 April 1989, NHSBSA sent Mrs L a letter confirming she was a deferred member of the Scheme, and her NRA was 60. There is no reference to NRA of 55 nor to SCS being guaranteed. NHSBSA says this is a standard letter, normally issued twelve months after members leave the Scheme.
11. Mrs L was not able to return to permanent employment with the NHS for several years, due to medical and childcare issues.
12. From 1989 to 1997, she worked part time and with flexible hours, as an agency nurse (1989 to 1990); in a nursing home (1991 to 1994); and as a bank nurse (February 1996 to July 1997). None of these roles entitled her to join the Scheme.
13. On 14 July 1997, Mrs L re-joined Basildon Hospital permanently as a nurse, and re-joined the Scheme. She has continued in NHS pensionable service from 1997 to date. Her membership in the Scheme is governed by The National Health Service Pension Scheme Regulations 1995 (**1995 Regulations**) (SI 1995/300). The relevant regulations are set out in the Appendix to this Determination.
14. In April 2016, Mr L received a pension estimate showing a NRA of 60. She says she assumed this was the default position, and that she retained SCS provided she remained in pensionable employment at age 55.
15. In December 2017, Mrs L asked for a pension estimate as she approached age 55. The annual benefit statement she received, dated 31 March 2017, also referred to a NRA of 60. She says this first put her on notice that she may have lost her entitlement to SCS.
16. NHSBSA subsequently confirmed that she had lost her entitlement to SCS, with a NRA of 55, because of a change in the Scheme regulations. The change meant that from 6 March 1995 when the 1995 Regulations came into force, a deferred member was only allowed to retain an entitlement to SCS if he or she had a break in continuous NHS pensionable service of less than five years on that date (the **1995 rule**).
17. NHSBSA explained that Mrs L had left the Scheme in 1988 and returned in 1997, and so she had exceeded the five year limit on 6 March 1995, by her absence of nine years from 1988 to that date.
18. On 25 January 2018, Mrs L wrote to NHSBSA asking for SCS to be restored because she had been deprived of her entitlement, retrospectively. She says she was not aware of this change in the Scheme, or informed about it until 2018, when she queried the position.

19. Mrs L said if she had been informed before 1993, she could have sought NHS employment with SCS to maintain her rights. She adds that she kept and filed all the pension documents and leaflets she received from NHSBSA during her career. Mrs L says the first document she can find that refers to the 1995 changes, was printed in December 1994, and received in 1995. She says she did not notice the 1995 rule at the time but, by then, she already had a seven year gap in pensionable service.
20. Mrs L said that if she had been informed about the changes she could have re-joined the Scheme before 6 March 1995, or taken part time NHS pensionable employment before 1993, so she could have retained her SCS.
21. On 9 Feb 2018, NHSBSA rejected Mrs L's complaint and confirmed she had lost her entitlement to SCS under the changes that applied from 6 March 1995.
22. On 12 March 2018, Mrs L contacted this office and, in her statement of complaint, asked for reinstatement of her SCS. She complained that NHSBSA acted unfairly in not informing her about the changes in 1995, thus depriving her of the opportunity to retain SCS by taking NHS pensionable employment.
23. Mrs L said that prior to 1997, she had only returned to temporary nursing roles that were not pensionable due to childcare and other medical issues. Her daughter was born in 1994 but, due to medical complications, she was unable to work for over a year at that time. However, Mrs L asserts this does not affect the fundamental point that when she left the Scheme in 1988, she legally retained her SCS pension rights until she returned to pensionable service, but she had been retrospectively and unfairly deprived of these.
24. This office advised Mrs L to complete the Scheme's internal dispute resolution procedure (**IDRP**) but her complaint was rejected at both stages of the IDRP. Consequently, Mrs L contacted this office again in October 2018, and asked for her complaint to be investigated.
25. In November 2018, NHSBSA disclaimed responsibility for any loss of Mrs L's entitlement to resume SCS. Its main points are summarised below:-
 - The Scheme regulations changed in March 1995, and Mrs L no longer qualified for SCS, due to more than five years' absence from the Scheme.
 - In its letter issued in 1989, NHSBSA correctly informed her she was a deferred member with a NRA of 60, without mentioning SCS or a NRA of 55. Mrs L did not question this at that time.
 - There is no evidence, from Mrs L's records, that she inquired about SCS until January 2018. It was reasonable to expect her to have contacted NHSBSA from 1988 onwards, to check if there were any changes to the Scheme that could affect her benefits. If she had done so, she would have been able to mitigate the changes to SCS before March 1995.

- NHSBSA complied with its legal obligations under The Occupational Pension Schemes (Disclosure of Information) Regulations 1986 (SI 1986/1046) (**Disclosure Regulations**) because it instructed all NHS employers to issue guidance to employees. It also took reasonable steps to publicise the changes to the regulations from November 1994 onwards. Information about the pending changes was not available to NHSBSA before that date, and so Mrs L could not have been informed about them before 1993, or when she left the Scheme.
 - Under the Disclosure Regulations, there was no legal obligation on NHSBSA to inform Mrs L about the changes to SCS, as there were no material changes to her pension rights. She was a deferred member, and only had a potential entitlement to SCS if she returned to pensionable NHS service, not a right.
 - Even if Mrs L had been informed about the changes to SCS before 9 March 1995, she was not able to take a permanent pensionable role in the NHS, because she was unwell and had childcare responsibilities and could only take short-term work with flexible hours.
26. In her email to us dated 22 August 2018, Mrs L refers to NHSBSA's comment that she should have contacted NHSBSA to inquire about changes to the Scheme that affected her. She says, "even if I had contacted NHSBSA, it is now clear that the only document that referred to this at the time only listed the new ruling under mental health officers (which I am not)".
27. Mrs L maintains that it is unfair to deprive her of an entitlement to SCS when she was legally entitled to take an unlimited break in pensionable service when she left the Scheme in 1988, and to retain a NRA of 55.

Adjudicator's Opinion

28. Mrs L's complaint was considered by one of our Adjudicators who concluded that Mrs L was not eligible to resume SCS membership under the Scheme and no further action was required by NHSBSA.
29. The Adjudicator's views are summarised below:-
- Mrs L was no longer eligible to resume SCS membership under regulation R2 of the 1995 Regulations because of the 1995 rule.
 - Mrs L was not unfairly deprived of her pension rights because NHSBSA had correctly implemented the 1995 Regulations and could not reinstate her SCS.
 - Mrs L informed us she had, on file, a Scheme document, dated December 1994, that referred to the 1995 changes so doubt was cast on her claim that NHSBSA did not inform her about the changes to SCS before they took effect in March 1995.

- Mrs L subsequently explained that she thought this document only applied to mental health officers, not SCS, but references to changes affecting special categories, like mental health officers, should have alerted Mrs L to confirm her SCS with NHSBSA.
- It was impossible to test Mrs L's assertion that she could have obtained NHS pensionable employment (and re-joined the Scheme with SCS) if she had known about the proposed change to SCS before 6 March 1995.
- By Mrs L's own assertion, her second child was born in 1994, but due to complications, she was unable to work for over a year following the birth. Accordingly, the Adjudicator considered that even if she had been aware of the changes to the Scheme at the end of December 1994, it is unlikely that she would have been able to take up permanent NHS employment before March 1995, due to illness and childcare responsibilities.
- NHSBSA had not failed to comply with its legal obligations to inform Mrs L about the introduction of the 1995 rule and loss of SCS. Consequently, the Adjudicator did not conclude that NHSBSA had prevented her from taking steps to mitigate her loss.
- NHSBSA's only obligation under the Disclosure Regulations was to inform Mrs L that she was a deferred member of the Scheme from February 1988 with a NRA of 60. NHSBSA had complied with this obligation by sending her its letter of 4 April 1989. There was no indication or guarantee in that letter that she had a right to retire with SCS at age 55.
- Regulation 5(6) (a) of the Disclosure Regulations provides that, where there is a change to the Scheme which will result in a material alteration in the information referred to in paragraphs 1 to 16B, and 18 to 20 of Schedule 1; all members (including deferreds) must be informed before that alteration takes effect. The information in Schedule 1 includes: normal pension age, what benefits are payable under the Scheme, how they are calculated, and the conditions on which the benefits are paid.
- NHSBSA argued that Regulation 5(6) (a) did not require disclosure of the 1995 rule to deferred members because there was no change to Mrs L's benefits or her NRA. The Adjudicator considered that NHSBSA's letter of 4 April 1989 had duly informed Mrs L about her preserved benefits, and that her NRA as a deferred member was 60 not 55, and these had not changed.
- Accordingly, the Adjudicator concluded that Mrs L was not eligible to resume SCS membership under the Scheme, and that there had been no maladministration by NHSBSA.

30. Mrs L did not accept the Adjudicator's Opinion and her complaint was passed to me to consider. Mrs L has provided detailed submissions through her husband, Mr L 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 L for completeness.

Ombudsman's decision

31. Mrs L's main submission is that the 1995 rule retrospectively removed her right to SCS, without prior notice, and is unfair and unjust.

32. Mrs L's submissions are outlined below:-

- On 27 February 1988, Mr L overheard a telephone conversation between Mrs L and NHSBSA in which NHSBSA said Mrs L's SCS benefit was preserved, provided she held SCS qualifying employment between her 50th and 55th birthday. NHSBSA also asked her to confirm any change of address. However, the correspondence Mrs L subsequently received from NHSBSA did not contradict that advice or refer to the 1995 rule.
- Contrary to assumptions that she was not fit to work because of medical issues, Mrs L was in good health between December 1994 and March 1995. She also had childcare arrangements in place with Mr L's father. She could have taken NHS pensionable employment to preserve her SCS pension if she had been informed of the 1995 rule at that time.
- There is nothing in NHSBSA's letter of 4 April 1989 to suggest SCS does not still apply. In fact, it supports her case as "it confirms her benefits are preserved. The default pension age of 60 is just that, just the default."
- The default age for any pension forecast would show 60 as her NRA because retirement at age 55 was subject to conditions. So, there was nothing controversial about her failing to identify this issue from pension forecasts.
- Mrs L had found the pension leaflet whilst attending a hospital appointment in late 1994 but she had filed it because it did not appear to affect her. It was only when she examined it in closer detail, in 2017, that she realised the five- year break rule for SCS was at the bottom of the Mental Health Officer section, rather than following the section applying to female nurses. It merely stated:

"These special rights will still apply to Scheme members who were in any of these jobs before 6.3.95 and who...."

So, its application to members with SCS was ambiguous.

- It was unreasonable to expect Mrs L to have checked regularly with NHSBSA about any changes to SCS. She had received correspondence from NHSBSA during this period and expected to be informed about anything that affected her.

- She was not informed, in 1988, that NHSBSA did not have a duty under disclosure rules to inform her of any changes to her SCS eligibility. There is nothing about this in any of the Scheme documents so there is no reason why she should be expected to ask about it.
- The loss of her SCS is fundamentally unjust. The 1995 rule was introduced without any advance notification or consideration for members, like herself. She abided by the advice given and the rules applicable at the time. This reform could never have been foreseen so Mrs L could not have planned for it.
- NHSBSA suggested the five-year qualification period for SCS was fair because it provided a reasonable period for a study break. However, it particularly affected female nurses on maternity leave, like herself. It was unfair that NHSBSA did not contact members who were on a break to give them some opportunity to protect their pension benefits. The 1995 rule retrospectively removed rights that had been legitimately acquired.

33. In addition to the above, Mr L submitted further submissions, as legal arguments, on behalf of Mrs L. These are summarised as follows:-

- There is an analogy with a criminal offence. NHSBSA has effectively convicted Mrs L of doing wrong, despite the principle of presumption of innocence.
- NHSBSA and other government bodies may be acting legitimately, but their combined actions have led to injustice for individuals like Mrs L.
- A court of law would not find against Mrs L and would uphold the principle that punitive legislation cannot be applied retrospectively.
- Mrs L followed advice given by NHSBSA, which has led to her falling foul of the legislation, contrary to the principle of entrapment.
- A court of law would also not find against Mrs L because she did not have a deliberate intention to contravene the rules for SCS. Though ignorance of the law is generally no excuse, NHSBSA made no effort to inform Mrs L about the 1995 changes.
- NHSBSA is abusing its position as "master of all matters" by not applying normal standards of justice. It makes Mrs L a victim of the system who is appealing against an unfair accusation that she has breached the pension rules.

34. Mr L also made the following additional points of clarification:-

- Mr and Mrs L had jointly planned their retirement around Mrs L's entitlement to retire at age 55.

- Mrs L was in hospital for several months before her second child was born on 29 June 1994. However, she could have taken up NHS employment in 1993, if she had suspected the 1995 rules would be introduced.
 - NHSBSA assured Mrs L that her pension benefits were preserved when she took maternity leave of absence. However, NHSBSA subsequently removed her right to retire at age 55 under SCS, even though this had been promised when she started contributing to the Scheme.
 - It cannot be right that a contractual provider like NHSBSA, can change the rules to SCS and reduce the benefits it had promised to Mrs L, without paying some compensation.
35. I have considered Mrs L's complaint and her further submissions in detail. Despite confirmation from Mr L that NHSBSA told Mrs L her pension benefits were preserved, I find that NHSBSA correctly refused to reinstate her SCS.
36. I agree that the 1995 rule is overriding. SCS was validly removed by secondary legislation that updated the regulations governing the Scheme. NHSBSA did not arbitrarily change its rules for members with SCS.
37. I consider that the 4 April 1989 letter fulfils NHSBSA's statutory obligation under the Disclosure Regulations, to inform Mrs L that she was a deferred member of the Scheme and her NRA was 60. I do not find that this letter confirmed that her rights to claim SCS still applied.
38. NHSBSA had confirmed there was a narrow window from November 1994 to March 1995, when deferred members like Mrs L, could have taken NHS pensionable employment with SCS. I am not able to test Mrs L's assertion that she was in good health and would have been able to work during this period. However, as she was not in fact, employed, I find on balance that she did not want to or was unable to work at that time.
39. Mrs L has accepted that she had obtained a leaflet in December 1994, that referred to the 1995 changes. Although Mr L says the wording in the leaflet is ambiguous, on balance, I find that it is reasonable to expect Mrs L to have questioned NHSBSA about the 1995 changes to special classes of membership at that time.
40. I find that NHSBSA did not have an obligation under the Disclosure Regulations to advise Mrs L, as a deferred member, about the potential change to her SCS pension. In addition:-
- I agree with the Adjudicator's view on the interpretation of the Disclosure Regulations. I consider that NHSBSA duly complied with its obligations to provide Mrs L with information about her Scheme NRA when she left the Scheme, and that the information did not change in 1995.
 - I find that NHSBSA duly issued a letter in April 1989, within the timeframes required by regulation 6(6) of the Disclosure Regulations, as then in force,

setting out Mrs L's NRA of 60, and the rights and options (if any) available to her.

- As Mrs L was a deferred member of the Scheme, I find that neither the Disclosure Regulations nor The Occupational Pension Schemes (Disclosure of Information) Regulations 1996 (SI 1996/1655) required NHSBSA to automatically provide her with information about her benefits, other than her NRA of 60.
- I also find that the legislation introducing the 1995 rule did not require NHSBSA to update deferred members who were affected. So, it was reasonable for NHSBSA to expect Mrs L to check her pension benefits and SCS when she received pension statements that confirmed her NRA was 60.

41. I also understand Mrs L's detailed submissions about the impact of general legal principles of the British judicial system on Mrs L's complaint. However, the 1995 regulations were ratified by parliament, and have the force of law. Although I do empathise with Mrs L's arguments and understand her frustration, unfortunately, I do not have a discretion to overrule the 1995 regulations.

42. Accordingly, I do not uphold Mrs L's complaint.

Anthony Arter

Pensions Ombudsman
5 February 2019

Appendix

The National Health Service Pension Scheme Regulations 1995 [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;

(b) if the member leaves pensionable employment because of redundancy, but without becoming entitled to a pension under regulation E3 (early retirement pension on grounds of redundancy), regulation L1 (preserved pension) will apply as if the references, in paragraphs (1), (3) and (4) of that regulation, to age 60, were references to age 55.

The National Health Service (Superannuation) Regulations 1980 (Revoked) (SI 1980/362)

54 Female Nurses, Physiotherapists, Midwives and Health Visitors

These regulations, in their application to females who for the whole of the last 5 years of service in the employment of an employing authority or in employment in which they are subject to a health service scheme are nurses, physiotherapists, midwives or health visitors, shall have effect subject to the modification that in regulation 8(1)(a)(ii) 55 years shall be substituted for 60 years.

8 Officer's pension and retiring allowance

(1) On ceasing to be an officer, a person shall be entitled to receive from the Secretary of State—

(a) an annual pension if—

(i) he has completed 2 years' service and is permanently incapable of discharging efficiently the duties of his employment because of physical or mental infirmity; or

(ii) he has attained the age of 60 years; or

...