

Ombudsman's Determination

Applicant	Mrs H
Scheme	NHS Pension Scheme (the Scheme)
Respondent	National Health Service Business Services Authority (NHS BSA)

Outcome

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

Complaint summary

3. Mrs H has complained that she should have contributed to the Scheme between 1994 and 2001, during which time she was employed by the NHS as a bank nurse. No contributions were collected from her during this period and consequently it shows as a break in membership on her Scheme record resulting in a loss of Special Class Status (**SCS**). Mrs H states that she did not opt out of the Scheme at any time and as such believes the break in membership occurred through no fault of her own, for which she is being penalised because she has lost her SCS.

Background information, including submissions from the parties

4. On 16 January 1985, Mrs H joined the Scheme as a Student Nurse working for Lewisham Hospital. On 13 June 1988, she became a Staff Nurse with the same employer and remained a member of the Scheme. Both roles qualified her for SCS which allows members to retire with an unreduced pension from age 55 if they remain in a SCS qualifying role until retirement.
5. On 20 March 1990, Mrs H left employment with Lewisham Hospital and left the Scheme.
6. On 22 July 1991, Mrs N re-joined the Scheme with SCS through her employment with The National Hospital for Neurology and Neurosurgery.
7. On 19 July 1992, Mrs N changed employment to Charing Cross Hospital as a Staff Nurse retaining her SCS. This employment ended on 24 January 1993.

8. On 1 February 1993, Mrs N re-joined the Scheme as a result of her employment with Royal Sussex County Hospital. This was also a role that qualified her for SCS. NHS BSA's records show that this employment ended on 18 September 1994.
9. On 6 March 1995, changes to the Scheme Regulations abolished SCS. However, existing SCS members could retain their status for future membership if they remained in a qualifying post until their retirement date and did not have a break in Scheme membership of 5 years or more.
10. Between 1994 and 2001, Mrs H worked for the NHS as a bank nurse, however she was not a member of the Scheme, nor did she make any contributions.
11. On 25 June 2001, Mrs H re-joined the Scheme when she started employment as a Registered General Nurse on the Bank at Royal Sussex County Hospital. While this role would have qualified for SCS, Mrs H did not retain her SCS because the gap in pensionable employment was greater than 5 years.
12. In 2017, Mrs H became aware that she had lost her SCS and could no longer retire from the Scheme at age 55 without reduction. She raised a complaint with NHS BSA which was considered under the two stage internal disputes resolution procedure (**IDRP**). NHS BSA did not uphold Mrs H's complaint at either stage on the basis that her employer over the period in question had confirmed that no contributions were paid and that she had opted out of the Scheme while working as a bank nurse. It would have expected her to have questioned why no contributions were being paid at the time, and for this to have been corrected if there was an error. As it was not, NHS BSA concluded that she opted out.
13. Mrs H remained dissatisfied and brought her complaint to us. Mrs H maintains that she did not opt out of the Scheme and is willing to pay the contributions for this period. She says her income in the bank role varied significantly and that this made her payslips inconsistent, so it is not reasonable for her to have noticed she was not paying contributions.
14. NHS BSA has confirmed that even though Mrs H has offered to pay the contributions that she would have paid over this period, the Regulations do not allow retrospective enrolment and it is not in a position to reinstate membership over this period.

Adjudicator's Opinion

15. Mrs H's complaint was considered by one of our Adjudicators who concluded that no further action was required by NHS BSA. The Adjudicator's findings are summarised below:-
 - NHS BSA is bound to administer the Scheme in line with the Regulations, it has no discretion over this unless a specific Regulation states otherwise, which is not the case here. It is also reliant on the information provided to it by employers and is entitled to rely upon it.

- There is some dispute over whether Mrs H opted out of the Scheme and whether there is any evidence to support this. NHS BSA's formal response to us states that Mrs H's employer was able to provide a copy of the opt out form, and evidences this by enclosing a copy of an email trail between Mrs H and her former employer which states, "I can actually send you a copy of the opt out form you signed. I'll get this organised and send to your home address."
 - This directly conflicts with a statement made by NHS BSA in its response to stage one of the IDRP in which it states, "I have contacted [your former employer], the person you have emailed yourself; she confirmed to me they no longer keep records going back to that period so they are unable to provide me with a copy of the paperwork you completed."
 - Despite this contradiction the Adjudicator was of the opinion that there is sufficient evidence to suggest that Mrs H did opt out of the Scheme, on the balance of probabilities. Emails from her former employer confirm that she opted out for the period in question and the fact that no contributions were deducted for this period supports this.
 - The Adjudicator noted Mrs H's comments that bank pay varies depending on the amount and type of work available and therefore her payslips varied from month to month. However, the Adjudicator did not agree that this variation would prevent Mrs H from noticing that no pension contributions were deducted over the entirety of this period, especially as pension contributions are normally detailed separately on payslips with employer contributions also shown. As such it is likely that she did opt out as she did not question the lack of contributions.
 - NHS BSA's position is that, from the information available, it must conclude that Mrs H opted out of the Scheme and that as the break was more than 5 years, she is unable to retain SCS under the Scheme Regulations. While it is unfortunate that Mrs H has lost her SCS as a result of this period not being classed as pensionable, the Adjudicator concluded that NHS BSA has not made an error in the manner that it has calculated or administered Mrs H's pension.
16. Mrs H did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr H, Mrs H's representative, provided his 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 Mr H for completeness.

Ombudsman's decision

17. Mr H has confirmed that while Mrs H's former employer offered to supply a copy of the opt out form she completed, and Mrs H accepted the offer, no opt out form was ever provided. NHS BSA's IDRP stage 1 response followed this email exchange and stated that the employer had informed it that it did not hold records going back that

far. I agree that this discrepancy has caused confusion, but I do not find that it has a material impact on the outcome of this complaint.

18. Ultimately, no contributions were made to the Scheme while Mrs H was working as a bank nurse. I am in agreement with the Adjudicator that Mrs H should have been able to identify this at the time and, if she held concerns, raise it with her employer. As no contributions were deducted and there is no evidence that either the employer or Mrs H queried this with NHS BSA, it is reasonable to conclude, on the balance of probabilities, that Mrs H opted out even though she does not remember doing so now.
19. Mr H has said that “the NHS should have a responsibility to point out clearly that pension contributions are not being made, and I believe I am right in saying that since then Government legislation re pension payments has made it mandatory for automatic enrolment.” NHS BSA is only notified that a person is employed by a Scheme employer if that person is enrolled into the Scheme. If that employee is not a member of the Scheme there is no reason for NHS BSA to be informed if they are working for a Scheme employer. Automatic enrolment legislation was not applicable at the time, and in any case, it is the employer’s responsibility to enrol employees and deduct contributions not the applicable pension scheme.
20. It is accepted that the implications of this are greater for Mrs H because she has lost her SCS as a result of this break in membership. Mr H has pointed out that she would have retained this if she had been enrolled in the Scheme between 1994 and 2001 even if only one contribution was made. While this may be the case, I cannot find that NHS BSA should have informed Mrs H that she was not paying contributions, or that if she had enrolled into the Scheme during the period in question she would have retained her SCS. NHS BSA was not, and could not have been expected to have been, aware that Mrs H was eligible to be enrolled in the Scheme at that time.
21. It is not disputed that Mrs H was not a member of the Scheme between 1994 and 2001 and that this exceeds the 5 years within which she would have needed to become a member in order to have retained her SCS. While Mrs H has said she is willing to pay the contributions for this period, I am satisfied that the Regulations do not allow retrospective membership, so this is not possible.
22. Therefore, I do not uphold Mrs H’s complaint.

Anthony Arter

Pensions Ombudsman
22 March 2019