

## Ombudsman's Determination

Applicant	Ms T
Scheme	NHS Pension Scheme (the <b>Scheme</b> )
Respondent	NHS Business Services Authority ( <b>NHSBSA</b> )

## Outcome

1. Ms T's complaint against NHSBSA is partly upheld, but there is a part of the complaint I do not agree with. To put matters right, for the part that is upheld, NHSBSA should make an award to Ms T in respect of the serious non-financial injustice caused to her.
2. My reasons for reaching this decision are explained in more detail below.

## Complaint summary

3. Ms T disagrees with NHSBSA's decision that she is not entitled to retain special class status (**SCS**). Ms T maintains that she has always worked in positions that have involved direct contact with patients, requiring her to be a first level registered nurse.
4. When making plans for her retirement, Ms T says she relied on pension estimates and statements provided by NHSBSA, which indicated that she held SCS. NHSBSA later withdrew it without consulting her. The withdrawal of the status has significantly impacted her retirement plans.

## Background information, including submissions from the parties

5. Section 10 (1): "Superannuation of persons engaged in health services, etc", of the Superannuation Act 1972 (the **Act**), says:

"The Secretary of State may, by regulations made with the consent of the Minister, make provision with respect to the pensions, allowances or gratuities which, subject to the fulfilment of such requirements and conditions as may be prescribed by the regulations, are to be, or may be, paid by the Secretary of State to or in respect of such persons, or classes of persons, as may be so prescribed, being—

(a) persons, or classes of persons, engaged in health services other than services provided by a local health authority or other local authority; ...”

6. The regulations made under the Act do not provide a definition of “nurse”.
7. Ms T is a member of the 1995 Section of the Scheme (the **1995 Section**).
8. The provisions of the National Health Service (Superannuation) Regulations 1980 to 1991, provide for the superannuation of individuals employed by the National Health Service (the **NHS**). The NHS Pension Scheme Regulations 1995, (the **1995 Regulations**), which came into force on 6 March 1995, consolidated, with changes, the provisions of the National Health Service (Superannuation) Regulations 1980 to 1991.
9. Regulation R2 of the 1995 Regulations (**Regulation R2**), contains special provisions for certain nurses, physiotherapists, midwives and health visitors: special class (**SC**) officers. The provisions allow those eligible members the right to take normal retirement pension from age 55. The 1995 Regulations withdrew these provisions for those individuals who first became members of the Scheme after 6 March 1995.
10. Regulation R2 applies to a member in pensionable service as a SC officer on 6 March 1995, or who has earned benefits in the Scheme in respect of a previous period in which they were employed as such, and at no time since the last occasion on which they were so engaged had a break in pensionable service for any one period of five years or more. Additionally, for Regulation R2 to apply, the member must have spent the whole of his or her last five years of pensionable employment as a nurse, physiotherapist, midwife or health visitor. The regulation ceases to apply if the member has a break in pensionable employment for any one period of five years or more ending after 6 March 1995.
11. The information made available on NHSBSA’s “Knowledge Base” states:

“If I have a break in service, can I keep Special Class status?

Yes, as long as your break in pensionable service is not five years or more you can retain your Special Class status.

A break in pensionable employment is not the same as a break in Special Class status. For example, you could have a break in a special class role for more than five years, but as long as you have not had a break in NHS pensionable employment the Special Class status can still be retained if you move back into [a] role which attracts Special Class status.

For more information please see the Special Class Factsheet on our [website](#).” (the **Guidance**)
12. In February 1991 Ms T took on the post of Deputy Director Business Development (the **Post**) for [XX] Health Authority (the **Health Authority**). The Scheme membership starter form (the **Joiner Form**) signed by Ms T, shows capacity code “4”:

“administrative & clerical”. Ms T indicated on the Joiner form that she had previously worked in the NHS as a “Project Manager.”

13. An update dated May 1994, submitted by the same employer, also shows capacity code 4.
14. Prior to this, Ms T’s various nursing posts automatically qualified for SCS.
15. NHSBSA has explained that Ms T’s right to SCS under Regulation R2 ended when she took up the Post because it was not a “front-line nursing post”. As such, retention of SCS in the Post, and each subsequent senior/management role thereafter, is subject to SCS being held in the immediately preceding post and whether the duties and person specification of the role means that only a qualified nurse could be appointed for that role.
16. Ms T’s employment history in successive jobs is as follows:

<b>Period</b>	<b>Post</b>
1993 to 1995	Healthcare Commissioner/Case Manager
1995 to 1998	Assistant Director
1998 to 2002	Chief Executive
2002 to 2007	Business Manager
2007 to 2013	Assistant Director of Nursing
2013 to 2015	Associate Director of Continuing Healthcare and Placements
2015 to date	Director of Integrated Commissioning for a Clinical Commissioning Group ( <b>CCG</b> ).

17. In November 1997, in response to a request for an estimate, NHSBSA provided Ms T’s then employer with an illustration of benefits as at a proposed retirement age of 60. NHSBSA quoted a pension of £21,317 per annum and lump sum of £63,953. Later that same month, NHSBSA replied to an enquiry from Ms T about additional benefits. NHSBSA said that she could buy up to 3 years and 72 days additional service at “full cost”, based on potential service of 36 years and 293 to age 60. NHSBSA said any future changes to her membership would affect the service that could be purchased.
18. In December 2001, Ms T elected to buy additional service of 3 years and 72 days to age 60.
19. On or around November 2010, NHSBSA provided Ms T with a “NHS Pension Choice Statement” (the **Choices Statement**). It notified Ms T of the option to remain in the 1995 Section or transfer to the “2008 Section”. NHSBSA said the benefit comparisons

as at ages 55 and 60, contained therein, were personalised to Ms T (the **Personalised Statements**). The notes in the Personalised Statements said:

- The normal pension age [(the **NPA**)] for the 1995 Section is 60, but as you are a member of the special classes you have the right to retire from age 55 with an unreduced pension.
  - For the 2008 Section the [NPA] is 65 and therefore if you [retire] at age 55 from this section your benefits are reduced to allow for them being paid for an extra 10 years.”
20. NHSBSA asked Ms T to consider, among other things, the age she intended to retire when making her decision about whether to transfer from the 1995 Section. NHSBSA restated that her accrued and future benefits in the 1995 Section would be paid unreduced from age 55.
21. NHSBSA has explained that it does not retain records of the date employers make electronic updates. However, employers can only provide updates in respect of records that relate to their employees. Sometime between 2001 and November 2010, changes or updates were received electronically, which resulted in Ms T’s Choices Statement showing that she had retained SCS. The change in the details held by NHSBSA suggests that amendments or updates were later received which resulted in Ms T’s record showing that SCS did not apply. Unless specifically instructed to do so by the relevant employer, NHSBSA would not amend its records from “Non-SCS to SCS.”
22. On 29 August 2014, Ms T’s employer generated a retirement estimate (the **Estimate**) as at January 2016: age 56. It quoted a projected lump sum of £95,375 and pension of £29,775 per annum respectively on early retirement. It stated that the benefits had been reduced for early payment.
23. The Estimate says that if Ms T’s NPA is 60, her pension contributions will cease when she has accrued 45 years of membership, or reached age 75. However, if her NPA is 55, her contributions will cease when she has built up 45 years’ service and attained at least age 60, or 65.
24. In the section of the notes headed “About Early Retirement”, it says as Ms T is considering taking early retirement, her retirement benefits have been reduced. It includes a table indicating the proportion of pension and lump sum payable from the early retirement ages specified therein.
25. On 1 September 2014, Ms T’s then employer (the **Trust**) emailed NHSBSA, saying:
- “Action/s Required: [Please] can the capacity code be changed to 01 special class. [Ms T] is a manager but is required to have a nursing qualification to carry out her current role.
- If you can e-mail me once record has been corrected” (the **Amendment**).

26. NHSBSA acknowledged the enquiry on 11 September 2014. It indicated to the Trust that it would provide a full response by 26 September 2014.
27. On 4 October 2014, Ms T generated an annual benefit statement online. It showed a normal pension age of 60.
28. NHSBSA replied to the Trust in early November 2014 and apologised for the delay in responding in full. NHSBSA said:

“...I can confirm that this has now been amended as per your request. Please note that although the member now holds Special Class status in your employment, she did not hold this for her previous post. This would also need investigating separately if [Ms T] believes the post would have been eligible for retention of special class. In order to retire at age 55, the member needs to be employed in a special class role for the last five years of employment.”
29. Around the same time, NHSBSA issued Ms T with a benefit statement, which showed a NPA of 55. The total reward statements NHSBSA provided to Ms T as at 31 March 2015 and 31 March 2016 also indicated that her NPA was 55.
30. NHSBSA has explained that the Amendment may have resulted in statements Ms T accessed online in November 2015, August 2016 and late November 2016 indicating that she could potentially retire early from age 55.
31. In respect of Ms T’s last three employments, only the job description for the Associate Director of Continuing Healthcare and Placements post has been made available to NHSBSA. The job description says it is “a senior clinical/managerial role that combines specialist-nursing expertise with high level commissioning and financial management.” It states that there are three key aspects to the role: commissioning for individuals and market management, clinical decision making governance, programme management and benefit realisation.” It says that the role requires “first level nurse registration plus additional registration/diploma and evidence of continuing personal development.” It also says a routine part of the job is the direct responsibility for “commissioning packages of care of patients and their carers”.
32. The person specification states that the post requires significant clinical experience, that it is office based, involves continuous use of a keyboard and an average five minutes per shift of “kneeling, crouching, twisting, bending or stretching”. It mentions that the role does not involve carrying out clinical/therapeutic/social care diagnoses/assessments. In terms of “the emotional effort” required to undertake clinical or non-clinical duties generally regarded as distressing and/or emotionally demanding, it states that it will require communicating life changing events to patients/clients on most days “and to referrers”.
33. Ms T planned to retire at the end of December 2017. She attained age 57 earlier the same year.

34. In May 2017, Ms T's employer generated a projection of Ms T's retirement benefits as at 31 December 2017. The statement quoted reduced benefits on early retirement from age 57. In response to an enquiry, NHSBSA confirmed to Ms T on 17 June 2017, that its records showed SCS and a retirement age of 55.
35. On 19 June 2017, NHSBSA apologised to Ms T concerning any misleading information she may have received prior to its service team considering her application for retention of SCS. NHSBSA said it had investigated the matter, and had noted that it was not possible for her to hold SCS from 1 April 2013 to 2 March 2014, as its records did not indicate that she held SCS in her previous [managerial] posts. NHSBSA asked Ms T to contact her respective employers, if she believed she retained SCS after 1991.
36. Later that same month, Ms S, Ms T's line manager, requested that NHSBSA review its decision to remove SCS from Ms T. Ms S said that Ms T had never worked in a position which did not involve direct care to individual patients, and while she held a senior nursing role, she personally managed the most complex patients in addition to providing nursing leadership to a team of 23 nurses. Ms S maintained that Ms T had held SCS throughout her career. She pointed out that Ms T's SCS had been confirmed in her Personalised Statements. Ms S also highlighted that Ms T's pension statements confirmed her NPA was 55.
37. On 10 July 2017, NHSBSA informed Ms S that the post Ms T took on 25 February 1991 was a general managerial post and not a clinical one, such as Director of Nursing. Consequently, it did not qualify for SCS. NHSBSA said that, for SCS to apply to Ms T's current post, she must have held SCS in her post immediately before her current post.
38. Ms T has been unable to obtain a copy of her personnel file in respect of her employment between 1988 and 1991, as those records have since been destroyed.
39. In September 2017, Ms T appealed NHSBSA's decision. She argued that NHSBSA had removed her SCS based on the job title of the Post without evidence to support its decision. Ms T provided a letter from the then Chief Executive she worked with between 1996 and 2011 (the **Statement**), a copy of her contract for the post she held between 2002 and 2007, and a curriculum vitae (the **CV**) describing her responsibilities for her subsequent posts.
40. The Statement says:

“...I can confirm that during the time I have worked with [Ms T,] she has been in posts that have required her to be a Registered Nurse.

...

When I became Chief Executive of [PCT,] I was acutely aware that the PCT did not have anyone with the clinical skills needed to effectively manage the Continuing Healthcare Service and team of nurse assessors. I was happy to

secure [Ms T's] services again and appointed her to the Assistant Director of Nursing post in 2007."

41. The Statement further says:

- Ms T was initially appointed to manage the "out of area" specialist treatments and took on the lead role for care in the community and the closure of old geriatric hospitals, and the "re-provision" of patients into care homes.
- Although some aspects of Ms T's role changed over time, she always managed teams of nurses who were responsible for assessing patient's health needs, developing care plans and arranging care.
- While Ms T moved into different roles, she retained the management aspect of this complex clinical areas.
- A major part of the role Ms T held from 2002 to 2007, "was the overall clinical management of four nursing teams delivering clinical assessment, placement and care management services ..."
- Ms T has always been in roles that require her to be a be a "Registered Nurse" and was always correctly given SCS.

42. Ms T has pointed out that she received five separate pieces of correspondence from NHSBSA confirming her normal pension age as 55. It was therefore not unreasonable for her to conclude that she could retire from that age. Ms T explains that she has been planning her retirement for some time. She originally planned to retire at age 55. However, she agreed to postpone her retirement for two years to allow her employer time to find a replacement with the required clinical skills.

43. Ms T's Representative (the **Representative**) maintains that NHSBSA has applied the Guidance and/or Regulation R2 incorrectly. Notwithstanding this, Ms T's employment between 1991 and 1993 included the following patient-focused responsibilities which required senior nursing expertise and knowledge:

- responsible for all out of area specialist treatment for patients; providing clinical input into the development of health care contracts; responsibility for developing of clinical service specification for all clinical areas provided by the Health Authority.

44. The Representative says Ms T was specifically recruited for the Post because of lack of clinical expertise in the team. The type of projects undertaken at the time, required specific nursing expertise. The Post was an exceptional appointment for the "Heath Authority Contract Team", not used to dealing with nursing staff, and proper consideration was not given to whether SCS applied to the role. The role did in fact require specialist nursing skills and should therefore have attracted SCS.

45. Ms T and her Representative's further comments are set out below.

- The first time Ms T received communication directly from NHSBSA was in 2011 about the new NHS scheme. The letter confirmed that Ms T held SCS, and that she could retire from age 55. Consequently, she had no reason to question anything sent after this as it was clear that she had retained SCS.
  - NHSBSA then provided annual statements which restated that Ms T held SCS and that her normal pension age was 55. These reinforced her understanding that she could retire from age 55. She was not aware of the correct position until she applied to take her pension in 2017.
  - Removal of her SCS is at odds with the Guidance, a breach of contract and ignores the common law duty of natural justice.
  - By the time NHSBSA had identified that there was an issue, Ms T's employment records had been destroyed, denying her the opportunity to correct deficiencies in NHSBSA's records. The timing of the decision means that it is impossible for her to obtain any evidence of the job descriptions for her past roles.
  - As a nurse, Ms T is required to achieve 450 clinical practice hours every three years for each of her two nursing qualifications to remain registered. She has achieved this in all her roles. The fact that she has retained her nursing qualification proves that she has been in nursing posts throughout her career.
  - As a member of the 1995 Scheme, Ms T is entitled to retain SCS provided she was in a clinical post after 6 March 1995, and did not have a break in pensionable service for more than five years. Ms T has held clinical posts since 1978 without any breaks in service. Consequently, she had no reason to doubt her SCS: she always assumed that she retained it.
  - NHSBSA's decision making process was flawed. Ms T questions whether NHSBSA considered the evidence she provided.
  - NHSBSA has a duty to act reasonably and fairly: it is unreasonable for NHSBSA to require Ms T to obtain evidence from employers that no longer exist, when the NHS records retention policy (the **Policy**) requires all personnel records to be destroyed six years after the relevant employment ends.
  - Although NHSBSA will have been aware of the Policy, NHSBSA said to retain SCS Ms T had to prove that she held the status in 1991. This is neither fair nor reasonable. Furthermore, rather than having to go back to 1991, Ms T only needs to provide evidence that she was in a clinical post in 1995.
  - When the Chief Executive joined, Ms T was in the same post that she held when the new NHS scheme was introduced in 1995.
46. NHSBSA does not accept that management positions automatically qualify for SCS. NHSBSA says that any agreement to retain SCS in Ms T's subsequent employment,



is subject to the relevant employer making an application. It is also conditional on SCS being held, or retained, in the post held immediately before that post.

47. NHSBSA has highlighted that the 1995 Regulations do not contain provisions concerning retention of SCS in management roles that would not automatically attract SCS. Any agreement to allow retention of SCS, is conditional on the nature of move from “front line” nursing to management and the duties of the new role. Usually there should be significant similarities between duties in the management role and the former SCS qualifying post, which demonstrates “a continuous commitment to the relevant service.” Furthermore, the member must hold SCS in the post he or she held immediately before taking on the management post. Consequently, if SCS cannot be guaranteed in one management role, it cannot be guaranteed in any successive management role.
48. NHSBSA says it is reliant on employers providing confirmation on whether a member has SCS, or whether SCS should be considered. NHSBSA would have expected either Ms T or her employers to have done so at the time. They did not enquire until September 2014 when Ms T’s record was updated by NHSBSA to show SCS, on the basis that it would be investigated for her earlier posts. However, Ms T’s records were reversed when it became clear the employer had not investigated further and that there was no supporting evidence.
49. NHSBSA’s further comments are set out below.
  - Ms T’s decision to spread the cost of her additional membership purchase to age 60 suggests she either accepted at the time that her NPA had changed back to 60, or that she was planning to retire at age 60. If Ms T needed to retire from age 55, she ought to have elected to spread the cost of purchasing additional membership to age 55.
  - The estimate and annual benefit statement Ms T’s employer and Ms T generated in August 2014 and Oct 2014 respectively shows that NHSBSA would have recorded her as having a normal pension age of 60 and not qualifying for SCS.
  - The information that was made available to NHSBSA, when it considered its decision, included the Joiner Form. It indicated that Ms T was not employed as a nurse. NHSBSA has not been provided with an official job description or person specification for the Post.
  - Neither the Health Authority nor Ms T asked NHSBSA to consider retention of Ms T’s SCS at any time.
  - NHSBSA took the information Ms T provided into account. However, NHSBSA does not consider that to be compelling evidence of the actual person specification or duties Ms T was required to undertake in the Post. Notwithstanding this, there is nothing that states conclusively that only a qualified nurse could apply for the Post.

- In her final appeal, Ms T stated that the Post was within a contract team located within the commission arm of the Health Authority. However, before her appointment the contract team comprised only of members of the estates team and had never included a registered nurse “in post”.
  - In the absence of any evidence to the contrary, NHSBSA concluded that SCS would not have applied to the Post. However, it is not clear when Ms T moved to a management role: her SCS may well have ended before 1991.
  - It is only possible for Ms T to retain SCS in any subsequent roles after 1993 if SCS could have been retained in the Post. Maintaining a nursing registration does not guarantee retention of SCS.
  - It is unlikely that the duties of a Chief Executive would meet the criteria for retention of SCS. The details provided in Ms T’s CV for the position appear to support this.
  - Due to her career progression, any financial loss Ms T considers she has suffered is offset by her higher pension benefits arising from her increased remuneration.
50. NHSBSA has acknowledged that Ms T was provided with conflicting information about her SCS. It also accepts that some of the information may have given Ms T the expectation that she was potentially on track to retire earlier than age 60. NHSBSA has apologised for the mistakes made.
51. Ms T has explained that each of her successive employers has confirmed to NHSBSA that the reason she retained SCS is because she was in a post that required her to be a registered nurse. The matter has caused her considerable upset. NHSBSA’s decision has significant and serious consequences for her and the life changing plans she made for her then impending retirement. She had intended to sell her house and retire to another part of the UK so she had started house hunting. She has now lost her dream home and suffered significant distress.
52. Ms T considered reinstatement of her alleged right to retire from age 55 would have put the matter right.

## **Adjudicator’s Opinion**

53. Ms T’s complaint was considered by one of our Adjudicators, who concluded that further action was required by NHSBSA to remedy the non-financial loss NHSBSA has caused to Ms T. The Adjudicator’s findings are summarised below: -
- To qualify for an earlier NPA under Regulation R2, it must be an essential requirement for Ms T to be a nurse in respect of her various management roles. They should involve responsibilities for nursing issues as demonstrated in the job specification or person specification.
  - Working as a nurse should have been a significant part of Ms T’s responsibilities, independently verified by a formal job description.

- The Joiner Form submitted to NHSBSA by the Health Authority, indicated that Ms T was not employed as a nurse. Apart from the Assistant Director of Nursing post Ms T held from 2007 to 2013, none of the roles she has held since 1991 include “nurse” within the job title.
  - Ms T has had various changes in roles since 1991, it seems less likely that all her past employers failed to correctly record SCS at the time, or to refer the matter to NHSBSA for advice if they were unable to determine her case.
  - It was not until some point between 2001 and November 2010, that NHSBSA received information indicating that Ms T retained SCS. NHSBSA subsequently received details electronically indicating otherwise. In the Adjudicator’s opinion, Ms T’s employers ought to have been suitably placed to make such an assessment.
  - Ms T elected to buy additional service to age 60 in 2001. This seems inconsistent with her expectation that her NPA was 55.
  - The Statement does not materially change the outcome in the circumstances.
  - Given the inconsistencies in the information provided in the Personalised Statements, the Estimate, and the benefit statement Ms T generated in October 2014, Ms T should have had sufficient cause to question their accuracy.
  - Even if Ms T could demonstrate that it was reasonable for her to have relied on the information, the evidence does not support that she entered into any financial plans or commitments that she could not later reverse, or mitigate.
  - The complaint should be upheld to the extent that NHSBSA provided conflicting and misleading information, and incorrectly restated Ms T’s right to retire from age 55. NHSBSA also failed to follow up with Ms T’s current employer within a reasonable timescale documentary evidence to support the Amendment. This, along with NHSBSA’s failure to investigate the reason for the change or update made by the respective employer(s) between 2001 and 2010, has likely compounded the issue.
  - NHSBSA should make a distress and inconvenience payment of £1,500 to remedy that injustice.
54. Ms T did not accept the Adjudicator’s Opinion and the complaint was passed to me to consider. Ms T provided her further comments but these do not change the outcome. I agree with the Adjudicator’s Opinion and I will therefore only respond to the key points made by Ms T for completeness.

## **Ombudsman's decision**

55. Ms T explains that, although she was very disappointed with the Adjudicator's findings, she does not intend to continue wasting money pursuing a complaint she initially raised two years ago, as she is now very close to her retirement age.
56. Ms T says she would like a distress and inconvenience award commensurate with the major lifestyle changes she had planned, which have now fallen by the wayside. In addition, she wants to be reimbursed for her legal expenses of approximately £4,000.
57. Directions for financial redress are generally in respect of financial injustice caused directly by the respondent's maladministration. However, it is also within my powers to award costs, including legal expenses, incurred in pursuing a complaint relating to that maladministration.
58. Having considered the circumstances of this case, I do not consider it appropriate to direct that NHSBSA cover Ms T's legal fees.
59. There is nothing to suggest that Ms T had mitigating personal circumstances such that she was prevented from pursuing her complaint without legal assistance. In any case, Ms T could have sought help from the Pension Advisory Service, at no cost to her, as her complaint is not exceptionally complex or contentious.
60. I am satisfied that the communications about Ms T's retirement age caused her serious distress and inconvenience for which my usual award is £2,000. In forming this view, I have taken into account Ms T's proximity to her preferred retirement age when the correct position was eventually clarified by NHSBSA. I have also considered that NHSBSA made a series of serious administrative errors by providing misleading and contradictory information, raising Ms T's expectation that she could take full pension from age 55 in circumstances where it must have been apparent to NHSBSA that the declared status of her last role was not definitive.
61. Therefore, I partly uphold Ms T's complaint.

## **Directions**

62. Within 21 days of the date of this Determination, NHSBSA shall pay £2,000 to Ms T.

**Karen Johnston**

Deputy Pensions Ombudsman  
26 March 2019