

Ombudsman's Determination

Applicant	Mrs N
Scheme	The NHS Superannuation (Scotland) Pension Scheme (the Scheme)
Respondents	NHS Lothian Board (NHS Lothian) Scottish Public Pension Agency (SPPA)

Outcome

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

Complaint summary

3. Mrs N has complained that she no longer holds Special Class Status (**SCS**), meaning that if she opts to retire at age 55, she will be subject to an early retirement reduction.

Background information, including submissions from the parties

1. Section R2 of the NHS Superannuation (Scotland) Regulations 1995 (**the Regulations**), as shown in the Appendix to this Determination), lays down the provision for Scheme members, who worked as a nurse, physiotherapist, midwife or health visitor, the option to retire at age 55 without a reduction to their pension.
2. Mrs N was a member of the Scheme from 23 February 1982 until 10 June 1996, including transferred-in service from NHS England and Wales.
3. Mrs N left the Scheme on 10 June 1996, but continued to work shifts on a request basis.
4. Mrs N re-joined the Scheme on 18 June 2001, and is still in NHS employment.
5. On 20 February 2017, Mrs N emailed SPPA as she wanted to enquire about purchasing additional pension. She also said she planned to retire at age 55 and believed this would not be subject to an early retirement reduction because she held SCS.

6. On 22 February 2017, SPPA informed Mrs N that her records showed she had a disqualifying break in service of over five years, which meant she no longer held SCS.
7. Mrs N raised a formal complaint through the Scheme's internal dispute resolution procedure (**IDRP**).
8. On 23 June 2017, SPPA provided its response under stage one of the IDRP. It said in line with the Regulations, as Mrs N had a break in service of over five years, she did not hold SCS. It appreciated that Mrs N may have been working between 1996 and 2001, but she was not paying contributions into the Scheme at the time, so it counted as a break in pensionable employment regardless of her being employed.
9. Mrs N responded and invoked stage two of the IDRP. In her letter, dated 16 October 2017, she said she was extremely disappointed with the stage one IDRP response. She said she had made financial decisions based on a retirement age of 55. The five-year break in service was due to the birth of her three children, and to look after her mother and father. She said she continued to work supporting resource pressures that the NHS faced by covering shifts, but she was unable to take up a more permanent role due to personal family responsibilities. Mrs N asserted that when she started working for Midlothian Morbidity Project on 18 June 2001, NHS Lothian HR department should have informed her that her SCS would not be reinstated due to a break in service of five years and eight days. She said her complaint was about the lack of information provided about SCS, and the possible consequences of having a break in service.
10. SPPA provided a response under stage two of the IDRP, it remained of the view that SCS could not be granted.
11. Mrs N wrote to NHS Lothian to raise a formal complaint. She said that it should have made her aware of the implications her break in service would have on her SCS.
12. On 19 March 2018, NHS Lothian wrote to Mrs N and asked her to provide evidence of her employment between 1996 to 2001.
13. On 23 April 2018, Mrs N wrote to NHS Lothian. She provided her old payslips and timesheets for her employment between 1996 and 2001. She said her complaint had not been considered properly. She said had she known about the five-year break in service rule, it is evident that she would have re-joined the Scheme sooner.
14. On 4 May 2018, NHS Lothian wrote to Mrs N. It acknowledged that her complaints did not relate to the application of the Regulations, but rather, that she had not been provided with information about the implications a five-year break in service would have on her SCS. Also, that in 2001, NHS Lothian had not advised her that had she re-joined the Scheme eight days earlier, her SCS would have been protected. NHS Lothian explained that its HR department was not run by pension experts. Therefore, it would always advise members of the Scheme to contact SPPA, as it administers the Scheme, and can provide information for individuals about their pensions.

15. Mrs N remained dissatisfied and brought her complaint to the us to be independently reviewed.

Adjudicator's Opinion

16. Mrs N's complaint was considered by one of our Adjudicators who concluded that no further action was required by NHS Lothian or SPPA. The Adjudicator's findings are summarised below:-
- Section R2 of the Regulations provides that if a person has a break in pensionable employment of over five years, that person is no longer able to retain SCS.
 - Mrs N had a break in service from 10 June 1996 to 18 June 2001. It cannot be disputed that this is a break in pensionable employment that exceeds five years. Therefore, SPPA has merely applied the Regulation in making the decision that she cannot hold SCS.
 - Mrs N's frustration is understandable as she has missed the opportunity to retain SCS by eight days. But, the Regulations are clear and cannot be overridden purely because she only exceeded the five-year time limit by eight days.
 - NHS Lothian did not have a duty to tell Mrs N about all the rules relating to SCS. There was information readily available online which explained the rules relating to breaks in service, and retention of SCS. Mrs N could have easily explored this when she left the Scheme, and ensured she did not lose her SCS.
 - NHS Lothian explained that it would pass all pension related queries to SPPA as it is not a pension specialist. Had Mrs N made enquires when she left the Scheme in 1996, she would have been directed to SPPA, and she would have been provided with the information.
 - Mrs N only investigated her SCS when she re-joined the Scheme, and by that time it was too late for it to be reinstated.
17. Mrs N did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mrs N provided her further comments which do not change the outcome. Mrs N said:
- a Member of Parliament (**MP**) supports her complaint;
 - she did not have easy access to online information in 1996, during her break in pensionable service, meaning information was not available to her online;
 - SPPA and NHS Lothian had a duty of care to inform her about how her SCS would be affected if she had a break in service of over five years; and

- SPPA said it was surprised that NHS Lothian refutes any responsibility to Mrs N, which implies NHS Lothian did have a duty to distribute information.

18. I agree with the Adjudicator's Opinion, and I will therefore only respond to the key points made by Mrs N for completeness.

Ombudsman's decision

19. There is no dispute that the Regulations which govern the Scheme provide that if a member has break in service of over five years, they will not be eligible to retain SCS. Mrs N has had a break in service from 10 June 1996 to 18 June 2001, which is over five years. SPPA's decision that Mrs N cannot hold SCS is the correct decision. It has applied the Regulations governing Mrs N's membership and it cannot be argued that the break in service was under five years.
20. Mrs N's complaint also concerns whether NHS Lothian or SPPA had a duty to tell her about the break in service rule. SCS was abolished in March 1995, but members were able to retain SCS if they did not have a break in service of over five years.
21. When Mrs N left the Scheme on 10 June 1996, she could have asked NHS Lothian how this would affect her entitlement to retire at age 55 without reductions. NHS Lothian has said it would have directed Mrs N to SPPA to provide details, as it did not have any pension specialists. Although, SPPA has said it is surprised that NHS Lothian did not provide any information to Mrs N when she left the Scheme, I do not consider that NHS Lothian was required to provide all the information about the implications of becoming a deferred member of the Scheme. I can understand Mrs N believing that both SPPA and NHS Lothian, have a duty of care. However, Mrs N did not ask how her SCS may be affected by leaving the Scheme and becoming a deferred member. I do not find that NHS Lothian or SPPA should be held accountable for this.
22. Mrs N has said that in June 1996, she did not have easy access to the internet. As a result of this, she asserts that she would not have had access to all the information on SPPA's website about the rules relating to retention of SCS. Although, this may be the case, there were other methods that Mrs N could have used to find out about SCS, for example by letter or contacting them by the telephone.
23. Mrs N's MP sent an email to this office supporting her complaint. I also, understand how frustrating it must be for Mrs N to have lost this valuable benefit by just 8 days. However, the information was readily accessible and would easily have been ascertained by enquiry of the SPPA. There is no legal requirement for either NHS Lothian or SPPA to have informed Mrs N directly.
24. Mrs N has not lost her SCS as a result of maladministration by NHS Lothian or SPPA.

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25. Therefore, I do not uphold Mrs N's complaint.

Anthony Arter

Pensions Ombudsman

8 March 2019

Appendix

The NHS Superannuation (Scotland) Regulations 1995 (SI 1995/365 (S.15))

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.