

Ombudsman's Determination

Applicant	Mrs E
Scheme	NHS Pension Scheme (the Scheme)
Respondent	NHS Business Services Authority (NHS BSA)

Outcome

1. Mrs E's complaint against NHS BSA is upheld and, to put matters right, NHS BSA shall, within 28 days of the date of this Determination, reconsider Mrs E's eligibility for Special Class Status (**SCS**). This is because there are flaws in NHS BSA's decision making process; that is:
 - it has not correctly applied Regulation R2 of The NHS Pension Scheme Regulations 1995 (**the Regulations**); and
 - it did not follow the approach set out in the judgment of NHS BSA v Williams [2017] ICR 327 (**NHS BSA v Williams**).

Complaint summary

2. Mrs E has complained that NHS BSA has said that she is not eligible to maintain her SCS. This means, if she chooses to retire at age 55, she will be subject to early retirement reductions.

Background information, including submissions from the parties

3. The Regulations, quoted in the Appendix, set out the benefit of SCS. Regulation R2 provides 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.
4. On 6 March 1995, SCS was abolished. Members of the Scheme who were in pensionable employment as a midwife, physiotherapist, nurse or health visitor on 6 March 1995, or who were previously in such employment and did not have a break in service of over five years, were eligible to retain SCS. The term "nurse" is not defined in the Regulations.

5. In 1983, the Griffiths report was issued. This provided NHS BSA with guidance on the discretionary decision it would need to make on deciding when a member should maintain SCS or not.
6. Mrs E joined the Scheme on 12 November 1979, and she was employed as a nurse until February 2001.
7. In March 2001 and until 2010, Mrs E worked in jobs where her nursing registration was not an essential requirement for the roles.
8. Mrs E then had a two-year break in NHS pensionable employment from 2010 to October 2012.
9. In October 2012 to May 2014, Mrs E re-joined the NHS and the Scheme. She was employed as a Site Deputy Chief Nurse at NHS Bolton Clinical Commissioning Group.
10. From May 2014 to date, Mrs E has been employed as a Director of Nursing at NHS Trafford Clinical Commissioning Group.
11. In late 2018, Mrs E began exploring retirement options as she was planning to retire in 2019, when she turned age 55. Mrs E became aware that NHS BSA did not consider that she held SCS. This meant that, if she made the decision to retire at age 55, her Scheme benefits would be subject to early retirement reductions.
12. On 1 June 2018, Mrs E invoked stage one of the two-stage internal dispute resolution procedure (**IDRP**), as she was dissatisfied that her SCS had been removed.
13. At stage one, NHS BSA said it did not consider that Mrs E was eligible for SCS retention.
14. On 22 October 2018, Mrs E invoked stage two of the IDRP.
15. On 14 December 2018, NHS BSA issued a stage two decision maintaining its view that Mrs E could not hold SCS. It said this was because, in her role from 2001 to 2010 it was not essential for her to hold a nursing qualification, meaning she was no longer eligible for SCS retention. She also had a break in service and she had not continually held SCS throughout all of her roles. NHS BSA apologised that Mrs E had received misleading information saying her retirement age was 55, but said this was due to her employer not keeping her SCS records accurately up to date.

Adjudicator's Opinion

16. Mrs E's complaint was considered by one of our Adjudicators who concluded that Mrs E's complaint should be upheld. The Adjudicator's findings are summarised below:-
 - Regulation R2 provides that a person in pensionable employment as a nurse on 6 March 1995, and who spends the last five years of pensionable employment as a nurse, is able to retire at age 55, without being subject to an early retirement

reduction. These are the only statutory requirements for SCS. "Nurse" is not defined in the Regulations.

- The provision for retention of SCS is set out in the Regulation R2(a)(ii), but the only requirement is that a member did not have a break in pensionable employment for any one period of five years or more between 6 March 1995 and the last five years of employment. Regulation R2(a)(ii) refers to "pensionable employment" not "pensionable employment as a nurse", so it is permissible under the Regulations for a member who has SCS to work in an area outside nursing for a period of their career, provided that they spend the last five years of their career in pensionable employment as a nurse.
- The Regulations do not specifically set out any different provision in relation to SCS eligibility when an individual member moves into a managerial position away from frontline nursing. Neither the requirement to hold a nursing qualification nor the requirement to continuously hold SCS are mentioned within the Regulations. NHS BSA has set up guidance to implement the Regulations, which is not an unreasonable approach. However, the test NHS BSA have applied is not in line with Regulation R2 and the approach set out in the case of NHS BSA v Williams.
- In NHS BSA v Williams, the court was asked whether Mrs Williams was 'in pensionable employment as a nurse' within the meaning of Regulation R2 of the Regulations. She had no nursing qualifications and was working as a nursery nurse in a hospital. The judgment held that it is not reasonable to rely solely on whether the person has nursing qualifications. A decision maker needs to consider a person's job description, job function, job title and professional qualifications, to establish they are a nurse for the purposes of Regulation R2. NHS BSA v Williams suggests that it is not NHS BSA who should make the decision on who is a nurse, but that this should fall to a court or ombudsman.
- It was the Adjudicator's view, that NHS BSA had not adequately investigated the tasks Mrs E completed in her roles, or whether they include nursing. Therefore, NHS BSA should re-consider its decision and Mrs E 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 the case.
- NHS BSA did not adequately address the reasons why Mrs E cannot continue to hold SCS under the terms of Regulation R2 and in applying the retention policy. It has not had regard to the interpretive approach that the courts have directed in respect of Regulation 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 has also said that, in order to retain SCS, Mrs E's previous role must have been eligible for SCS, but there is nothing within the Regulations that states this. So, NHS BSA is required to reconsider its decision.

17. NHS BSA did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. NHS BSA provided its further comments which do not change the outcome. I agree with the Adjudicator's Opinion and I will therefore only respond to the main points made by NHS BSA for completeness.
18. NHS BSA said the following:-
 - It considered Mrs E's roles and made the decision that they did not qualify for retention of SCS. It said that Mrs E had never provided any information that showed she was working on a ward or completing any nursing.
 - It said the type of work Mrs E completed was far too removed from direct line nursing and that she did not provide patient facing care.
 - NHS BSA said that, from the information provided, it believed that Mrs E had not worked in nursing for 13 years.
 - NHS BSA referred to the 1983 Griffiths report, which is what it uses when making the decision whether someone should maintain SCS. It provided historical information from the 1960s and 1970s which it used in its decision making for SCS.
19. Mrs E accepted the opinion and did not make any further comments,

Ombudsman's decision

20. Mrs E has complained that NHS BSA has said that she no longer holds SCS. This means, if she chooses to retire at age 55, she will be subject to early retirement reductions.
21. NHS BSA has not considered Mrs E's roles within the NHS Bolton Clinical Commissioning Group and NHS Trafford Clinical Commissioning Group correctly. It has said that Mrs E has never provided information to show she was working on a ward or completing any nursing. It has also said that the type of work Mrs E completed was far too removed from nursing and that her records showed she had worked outside of nursing for 13 years.
22. The historical information provided by NHS BSA was superseded by the Regulations.
23. The test NHS BSA apply is whether a member is allowed to maintain SCS after 6 March 1995, by virtue of remaining in qualifying SCS employment. However, if the member has not maintained SCS under Regulation R2, then she can be considered for SCS under the discretion of the Secretary of State following the Griffiths report in 1983. If the member falls into the discretionary decision category, the member could not maintain SCS if they moved into administrative role and then back into a senior nursing role, but if they stayed in a nursing role, they could maintain SCS.

24. Regulation R2(1)(b) states that a member qualifies for SCS if she "spends the whole of the last five years of her pensionable employment as a nurse". However, NHS BSA have restricted the test to cases in which a member qualifies for SCS only if she: "is employed as a nurse in a patient facing role which due to its arduous nature allowed her to main her SCS, or her role required her to directly supervise other nurses who were undertaking patient facing roles." NHS BSA have put a test in place which is more restrictive than the test set out in the Regulations.
25. The Regulations also say that the member loses eligibility for SCS if they have had a break in pensionable employment for five years or more. Mrs E only had a break in pensionable employment of two years between 2010 and 2012. The Regulations do not specify a break from nursing; it simply means a break from NHS employment. So, a member could have worked in any role after 6 March 1995 and maintained SCS, as long as they spent the last five years of pensionable employment as a nurse, physiotherapist, midwife or health visitor.
26. The decision making process used by NHS BSA in Mrs E's case was not in line with the correct tests in Regulation R2 and NHS BSA v Williams. I find that NHS BSA must re-consider Mrs E's eligibility for SCS.
27. I uphold Mrs E's complaint.

Directions

28. NHS BSA shall, within 28 days of the date of this Determination, reconsider Mrs E's eligibility for SCS.

Anthony Arter

Pensions Ombudsman
10 March 2020

Appendix

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;”