

**PENSION SCHEMES ACT 1993, PART X**  
**DETERMINATION BY THE PENSIONS OMBUDSMAN**

<b>Applicant</b>	Ms C Williams
<b>Scheme</b>	NHS Pensions Scheme ( <b>the Scheme</b> )
<b>Respondent(s)</b>	NHS Business Services Authority

**Subject**

Ms Williams' complaint about NHS Pensions, the managers of the Scheme, is that they should re-instate her Special Class status (**SCS**) under the Scheme which she says was removed in 2004. She adds that she has believed over the last 36 years that she qualified for SCS and planned accordingly.

**The Pensions Ombudsman's determination and short reasons**

I find in Ms Williams' favour. The nature of her work means that she does in fact qualify for SCS.

## DETAILED DETERMINATION

### Background

1. When the NHS was formed in 1948 some groups such as female nurses, midwives, health visitors and physiotherapists had previously been covered by a provision in the Local Government Superannuation Act 1937 which allowed them to retire at age 55. NHS Pensions say that the original provision was in recognition of the arduous duties and high standard of fitness required. There was no definition of “female nurse” and NHS Pensions say that the provision did not apply to Nursery Nurses because they tended to care for healthy babies rather than sick ones.
2. The provision was replicated in the pension scheme for NHS employees. I further understand that there was a similar transfer of roles from other organisations, such as local government bodies, to the NHS in 1974. From the start the provisions applied to all NHS employees who met the criteria, whether their employment was transferred from elsewhere, or they had joined an NHS employer directly. The categories covered by these provisions are known as the “Special Classes” and a person in such a class is described as having “Special Class Status” or “SCS”. On the transfer in 1974 employing authorities were not told that Nursery Nurses should not be regarded as nurses. In 1978 their exclusion was reinstated.
3. With effect from 6 March, the 1995 National Health Service Pension Scheme Regulations (**the Regulations**) replaced previous regulations and removed the possibility of Special Class membership for new members joining the scheme after that date.
4. The relevant provisions are now contained in Part R of the Regulations:

**“Part R Special provisions for certain members**

...

**R2 Nurses, physiotherapists, midwives and health visitors**

(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 this Section of 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 EI (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;

...”

A number of roles, such as “mental health officer”, are defined elsewhere in the Regulations. However there is no definition of “nurse”.

5. Regulation U2 says:

**“U2 Determination of questions**

Any question arising under these Regulations as to the rights or liabilities of any person shall be determined by the Secretary of State and any dispute shall be resolved by the Secretary of State in accordance with the dispute resolution procedure issued from time to time by her in conformity with section 50 of the Pensions Act 1995.”

6. By the NHS Business Services Authority Directions 2013 the NHS BSA were given authority to exercise functions on behalf of the Secretary of State in relation to the Scheme.

7. As stated above, The Local Government Superannuation Act 1937 contained the original provisions for retirement at age 55 for specified classes of health worker. Section 16(1) begins “In the case of female nurses, midwives and health visitors ...”

8. There is no definition of “female nurse” (or of “midwife”, though there is a definition of “health visitor”).

9. A NHS Superannuation Branch circular of 22 August 1988 (**SD Letter 88(20)**) said:

**“...I. NURSERY NURSES – SPECIAL CLASS STATUS**

Following several enquiries made to the Branch, it is confirmed that Nursery Nurses, including those working in special care baby units are not members of the special classes as defined by the regulations.

Consequently the minimum retiring age for this group of employees is age 60...all Nursery Nurses should be shown as capacity code “4” on forms...Employing Authorities are asked to bring to the attention of this group of employees that they are not members of the special classes and their normal retiring age is 60. The EA Guide will be amended in due course.”

10. The Department of Health have explained the background as follows (as have NHS Pensions in similar terms).
11. During 1989 and 1990 there was a reconsideration of the position of the SCS. It was decided that the earlier main focus on “physically arduous” duties for classification purposes had by then become less relevant. In contrast the holding of a professional nursing qualification had become more important. In relation to nursery nurses in neonatal intensive care units they sought views on their position and were advised that the role remained mainly concerned with routine caring duties and normally for healthy rather than sick patients. While some Nursery Nurses were beginning to undertake more duties of a clinical nature this was, and remains, under the direction of a professionally qualified senior nurse. Following this review the Department maintained its earlier determination that SCS could not apply to nursery nurses. Their roles, even in the neonatal units, were not considered physically arduous and did not require a professional qualification. They were mindful that while whilst many nursing roles had evolved and continued to do so the SCS provisions were about protecting the rights of staff who had met the criteria prior to certain transfers of function to the NHS.
12. Another NHS Superannuation Branch circular of 3 April 1989 (**SD letter 89(7)**) said:

“...This letter is to provide EAs [employing authorities] with some background on the criteria to be used when applying capacity code I and to assist them in determining the correct capacity coding for certain community staff.

## 1. SPECIAL CLASS STATUS BACKGROUND INFORMATION

Capacity code I carries automatic entitlement to special class status ie the right of a female scheme member to retire at age 55, providing they have been a member of the special classes during the whole of their last 5 years of service. This concession was granted to female nurses, physiotherapists, midwives and health visitors because it was felt that the arduous physical nature of practical nursing required a degree of stamina that could not be demanded of women beyond the age of 55.

## 2. GUIDANCE FOR EAs IN DETERMINING CAPACITY CODE I

EAs are reminded that it is SOLELY the duties performed that determine special class status and classification is not influenced by either the pay scales used or the possession of a nursing qualification.

Whilst nursing duties are many and varied the following, if they form a major proportion of the duties performed, will comply with the definition of arduous for the purpose of granting special class status

- Lifting, carrying, controlling and restraining
- Feeding, bathing, dressing and attending to personal needs
- Constant attendance and monitoring of patients
- Responsibility for administering treatment and drugs.”

13. A NHS Superannuation Branch circular of 18 June 1990 (**SD letter 90(13)**) said:

### “...SPECIAL CLASS STATUS

#### BACKGROUND

1. We have issued a considerable amount of advice to EAs on questions of eligibility for Special Class Status. In particular there have been problems in deciding who could be accepted as a female nurse and thereby qualify for Special Class Status. Because of the complexity and amount of advice given on this subject over the years a large number of individual cases have come to the Branch for a decision. This procedure is time consuming and has, on occasions, caused recruitment difficulties for EAs. In an effort to reduce number of referrals to the Branch the guidance on Special Class Status for nurses has been brought together and is set out below.

#### DEFINITION OF A NURSE

2. A member is accepted as a nurse if she holds a nursing qualification recognised by The UK Central Council for Nursing, Midwifery and Health Visiting and is employed in a job which requires such a qualification as part of the job specification. In addition, those in occupations traditionally accepted as analogous to nursing can be classified as nurses. These include Nursing Auxiliaries, Physiotherapists, Midwives and Health Visitors. Nursery Nurses do not qualify for Special Class Status.

## OCCUPATIONAL HEALTH NURSES

Occupational Health Nurses have not, in the past, been accepted as qualifying for Special Class Status. It has now been agreed that they should do so. **EAs should therefore amend their records to redesignate all Occupational Health Nurses as members of the Special Classes and advise the members concerned.**

14. The Employing Authority pension guide, written by NHS Pensions for NHS employers, says that employers will be responsible initially identifying special class members by entering the capacity code “01” on any joining forms. The definition provided within this guide is the same as that in the circular from 1990, and hence includes the statement that “...Nursery Nurses do not qualify for Special Class Status”. This is repeated again in a table of the codes which says in the description box for capacity code 01 that it applies to “Nurse (not Nursery Nurse)...”.

### Material Facts

15. Ms Williams has worked for the NHS since 1977 as a Nursery Nurse in a neonatal intensive care unit. On her appointment the payroll department gave her the Pension Code “01” – being that she had Special Class Status. (That would be consistent with NHS Pensions explanation of a failure to tell authorities to exclude nursery nurses between 1974 and 1978.) Ms Williams was aware of her status.
16. In 2004 a query was raised over whether Ms Williams was entitled to SCS. As a result of enquiries the status was removed from her records, giving her code “04” instead.
17. Ms Williams says that she remained under the belief that she qualified for SCS but became aware in 2012 that she was not listed as such when she requested a pension forecast. She raised a formal complaint with NHS Pensions and also made a number of phone calls to their helpline and discovered the amendment to her records in 2004. Ms Williams said that she had therefore qualified for this status up to 2004, when it was removed, and asked that it be reinstated.

18. Letters of support were sent from a senior nurse to NHS Pensions in May and August 2013. These letters said that Ms Williams did carry out a nursing role within her unit and although her job description said “care” this related to the nursing care of babies. Whilst Nursery Nurses were under the supervision of the nurse in charge this was no different to the registered band 5 and 6 nurses. Their view was that Ms Williams should therefore be considered in the SCS as defined by NHS Pensions. The responses from NHS Pensions said that Ms Williams was not, and never had been, entitled to SCS.
19. On 30 January 2014 NHS Pensions wrote to Ms Williams and said that they had been in touch with her employer who had confirmed that she has been employed as a Nursery Nurse since 1977. Since SCS did not apply to such roles her record had been amended to show non-SCS service from commencement.
20. Ms Williams retired and drew her benefits under the Scheme on 7 June 2014.

*Comments from Ms Williams’ employer*

21. Her employer, which is not a respondent to the complaint, has said the following.
22. Staff employed as Nursery Nurses at the time Ms Williams was first employed were required to have gained the National Nursery Examination Board (**NNEB**) qualification. Whilst this was not a United Kingdom Central Council for Nursing, Midwifery and Health Visiting qualification, it was widely viewed as an essential qualification for staff working as Nursery Nurses within the Special Care Baby Unit neonatal area. The NNEB qualification appears as an essential criterion on the person specification for this post and is broadly comparable to NVQ level 3. In addition Nursery Nurses are required to undertake the NHS course “Nursing care of well and sick babies”.
23. In relation to the list of duties given in the 1989 circular referred to in paragraph 12 above they say that while it would not be appropriate for staff to “restrain or control” babies, the remainder of the duties quoted would form a major proportion of Ms Williams’ duties. They have provided details of complex duties undertaken by her adding that within the neonatal unit Nursery Nurses are viewed as most valuable members of the nursing team.
24. On her appointment as a Nursery Nurse the payroll department (then under the South Glamorgan Health Authority) had attached the Pension Code “01” and this information would have been sent to NHS Pensions.

25. In relation to what Ms Williams' role was in 1995 (when the Regulations came into force) they say that the role of Nursery Nurses has evolved over time. They are now trained in giving medication and need to complete a drug training and assessment which was approved by the Trust Board – and this was new since 1995. The cohort of babies that they would be expected to look after now has changed as neonatal care has developed and more extreme premature babies are surviving. More nursing care was needed which is provided by the Nursery Nurses under the supervision of a trained nurse.
26. They have also provided us with a job description for a Nursing and Midwifery Staff Council Grade C Nursery Nurse that was in place prior to 1995. It is essentially identical to the role description in use from 2004.
27. The “specific duties” are as follows:
  - “1. To promote and maintain a safe environment for all babies and a pleasant atmosphere for babies, parents and visitors.
  2. To ensure that parents have the knowledge and understanding of all aspects of the care and needs of their baby. Providing sensitive information, advice and instruction, specifically teaching the parents the drawing up and administration of medications prior to discharge.
  3. For the period of duty, implement and maintain the care of babies allocated to you, to meet the identified need of the baby, planning and organising straightforward tasks and activities, e.g.: discharge home from NNU.
  4. Perform skills where there is a specific requirement for speed or accuracy. Make judgements involving facts or situations some of which will require analysis e.g. drug administration (following Trust drug administration policy for Nursery Nurses). Care of oxygen depend[e]nt babies. Care of babies following surgical procedures. Resuscitation. Performing Guthrie tests. Tube feeding babies. Assisting with hearing and eye tests.
  5. To work within the team to help and promote corporate approach to the neonatal care in conjunction with Medical Staff and professionals allied to medicine.
  6. Demonstrate own knowledge and skills acquired through formal training and experience and participate in the teaching of students and less experienced staff in the care of babies within the NNU.
  7. To ensure the accurate and legible documentation n of babies['] care plans and other reports. To communicate with the nurse in charge. To undertake surveys/audits as necessary to own work. To use computers to store and retrieve data.

8. To attend ward meetings ensuring effective communication is developed within the team.
  9. To ensure the safe storage of all the stock and equipment within own responsibilities. To recommend and practice acceptable economies.
  10. Physical effort – frequent requirement for standing/sitting in a restricted position for a substantial proportion of working time. Occasional requirement to exert moderate physical effort e.g. standing at incubators, moving equipment.
  11. Mental effort – frequent requirement for concentration where the work pattern is predictable, e.g. preparation of all milk feeds.
  12. Emotional effort – frequent exposure to highly distressing or emotional circumstances e.g. difficult family/social issues collapse/death of babies. Emotional support of parents.
  13. Working conditions – frequent exposure to highly unpleasant work conditions. Handling of body fluids and foul linen on a daily basis.”
28. We also asked for a copy of the job description of the most nearly comparable nursing job to that of a Neonatal Nursery Nurse that *would* qualify for SCS. In response they sent us the job description for a Nursing Auxiliary within the Women’s and Child Health Directorate, who would potentially work alongside a Nursery Nurse.
29. Ms Williams’ employer says that a Nursing Auxiliary could be entitled to SCS. They have provided a NHS BSA factsheet (Special Class status factsheet (06/13)(V3.0)) that, like other guidance, says that Nursery Nurses are excluded, but goes on to say:
- “It should be pointed out that on basic granting of SC status, the nursing qualification is not always required.
- An example being a Nurse Auxiliary who may perform the same arduous duties as a qualified nurse grade but who does not hold a nursing qualification would qualify for SC status. The essential factor is that they are working in a nursing capacity. Conversely a person, who holds a nursing qualification but works as for example, a secretary, would not qualify for SC status.”
30. The job summary for a Nursing Auxiliary says that the post holder assists the qualified nurse within the clinical area to provide care and support to children/young people and their families while attending the department. Duties would be carried out as directed by the qualified nurses, who would also supervise activities. Specific duties listed included the giving of direct patient care, carrying out height and weight assessments and other baseline assessments. Also

included were reception duties, maintaining the cleanliness of the clinical area and equipment, stock orders and contributing to safety of the area.

### **Summary of Ms Williams' position**

31. The position regarding the lack of SCS only came to her attention when she received a forecast in 2012 and compared this to the forecast for another Nursery Nurse. She had also recently found out from the NHS Pensions helpline that SCS had been removed from her membership on 1 April 2004 and had applied up to this date. She had not been informed of this. Also she was not contacted by anyone in 1988 after SD Letter 88(20) was sent. (As the extract above shows, that letter had told employing authorities to talk to Nursery Nurses about their SCS entitlement).
32. Other Nursery Nurses on her unit had SCS, some of whom had already retired. So it was untrue when NHS Pensions said that the provisions had never applied to individuals in her role and she was being treated unequally. (I have seen no evidence that other Nursery Nurses have been given SCS but Ms Williams did write to the Pensions Ombudsman Service saying that another Nursery Nurse had had her SCS removed in late 2013, probably as a result of her complaint.) Ms Williams had planned to retire at age 56 and 6 months in June 2014. She stood to lose between a significant proportion of her pension income if she retired at this time without SCS, as it would be classed as voluntary early retirement.
33. Her job description says that her duties are primarily the nursing care of sick neonates on the neo-natal intensive care unit. She had worked for 36 years on this unit during which time her role had evolved into a unique role for Nursery Nurses, which should be taken into consideration. In her role she faced the same stressful situations as any staff nurse. The role of a Nursery Nurse on the neo-natal unit is totally different to that of a Nursery Nurse working in the hospital crèche, where they give basic childcare and supervise play. It was also different to that of a Nursery Nurse on maternity wards where they give support to mothers caring for their own babies. Her own role was one of nursing duties for sick and vulnerable babies. She had also always worked nursing shift hours. The archaic view based on a 1988 ruling does not take into account the duties that she performs. Further she understood that some health care support workers have SCS if their job is as nursing intensive as hers.

34. For her role she had the NNEB qualification and had also taken further training within the trust (her certificate is from 1976). She had gained the Certificate in Nursing Care of Well and Sick Babies (in 1978) and also the Certificate in Drug Administration (in December 2003). On her record the trust describes her profile as “Clinical Attributes: Neonatal Nursing. Contract Details: Substantive Nursing”. She performed as a Nursery Nurse at the top of “Band 4”, which was assigned to such roles for their nursing skills and duties.
35. She had the support of the Senior Nurse for Paediatric Critical Care and Neonatology, who had provided a statement to NHS Pensions (a copy of this has also been given to my office). Her manager was prepared to change her job title if this helped. She was upset to lose a portion of her pension because of her job titled being taken into consideration rather than the actual job that she did. She asks that SCS be reinstated.
36. Ms Williams has provided a long list of nursing tasks that she performs. She works under the direction of the Senior Nurse and the Doctors, but this is also true all of the "qualified" Nurses on the unit. Her role on the unit is the nursing care of sick babies – if the babies were healthy they would not need the care of her unit. Further she considers that being on her feet for a twelve and a half-hour shift on a very busy Neonatal Unit with little time for uninterrupted breaks, due to the constant needs of the sick babies, as “physically arduous”.
37. In relation to what her role was like in 1995 she has said the following. Her role has always been to identify and plan the nursing needs of allocated babies during her shift. This has always been for sick and vulnerable preterm infants and also the nursing care of post-surgery babies. Therefore the care was very different from basic care. Her role has always required her to give oral medication and was recognised by the Trust with a local certificate. Similarly her role has always required passing naso-gastric tubes, which is a nursing procedure and not basic care. So her role was not so different in 1995 to the role description in 2004. During the last twenty years of neonatal care the surviving babies have more complex health needs. Another example was that in 1995 if a baby needed oxygen he would need to stay in hospital for this. Now the babies can be discharged home with oxygen, but after training from a Neonatal Nursery Nurse for the parents. They were also required to teach tube feeding and these were two examples of how the role had changed since 1995.

38. The nursing auxiliary position came under the definition of “Nurse”. This post usually carries no recognised nursing qualification and yet was still classified as a nurse. The job description provided by her employer for a “Band A” nursing auxiliary is only very basically comparable to her “Band C” role. Her role included duties such as drug administration, blood taking and resuscitation so was at a much higher level of nursing. Even though she had no nursing qualification her role equated more to that of a junior staff nurse role.

### **Summary of NHS Pensions’ position**

39. Ms Williams has never been informed by them that she had SCS as a neo-natal nurse and this status would not apply to any individual working in this grade. There was no doubt that neo-natal nurses are valuable members of the NHS who deliver care to vulnerable patients in stressful circumstances. It was also accepted that staff in such units work under supervision of a senior nurse. However a nursing qualification is not a specific requirement for the post.
40. Although representations had been made on a number of occasions that neonatal Nursery Nurses should be entitled to SCS it is not one that can be extended to other groups of staff, or one that would be introduced now, to enable them to benefit from this historical provision. The matter was considered again in 1989 and among the representations made was the arduous nature of the duties. The fact that Nursery Nurses did not qualify for SCS was also confirmed to employers in SD letter 88(20).
41. It is an employer’s responsibility to confirm to NHS Pensions a member’s capacity code, which indicates their employment group, on joining. It appears that at some point Ms Williams’ employer had recorded her capacity code as “01” up to 31 March 2004. Following investigations with her employer in which it was confirmed that she had always been employed as a Nursery Nurse their records were amended to reflect the true position. SCS had therefore never been withdrawn from her as it had never applied to her post.
42. The only communication they had with Ms Williams about SCS, prior to her dispute, was a telephone call of 20 March 2013 in which they advised that SCS had not been updated on the records. During this time there were in contact with her employer and advised them that SCS did not apply to Nursery Nurses.

43. NHS Pensions have also provided my office with copies of recent retirement benefit quotations given to Ms Williams along with a copy of the NHS Pension “Choice” statements sent to her in 2008. None of these show her as having SCS as they show actuarially reduced benefits for retirement ages prior to age 60 (the normal retirement date for the Scheme). They say that while Ms Williams may have planned to retire at age 56 it was difficult to see how this could have been on the grounds of having SCS in light of these quotations.
44. The definition of “Nurse” in use had not changed during Ms Williams’ employment and the definition given in 1990 is still used for the purposes of defining a nurse under Regulation R2. These concessions had not applied to Nursery Nurses prior to the start of the NHS or since.
45. The term “Nursery Nurse” is not defined in the Regulations. However the references to this term in NHS Pensions literature applied to both Nursery Nurses working on neonatal units and also those working in hospital crèches.
46. The term “Nurse” is not specific to the Regulations and is not defined in the Regulations. The advantageous conditions existed before the formation of the NHS in 1948. They were unable to say where the current definition originates from. SD letter 90 (13) provides information to employers about who the UK Central Council for Nursing, Midwifery, and Health Visiting (now the Nursing and Midwifery Council) would deem to be a nurse. From the information that remains available they understood that SD letter 89 (7) was issued to clarify existing policy on SCS to ensure it was correctly awarded in all cases where it was appropriate. It did not contain any change in policy. SD letters provided guidance to employers to enable them to fulfil their joint obligations in administering the scheme but they do not form part of the regulatory framework of the Scheme.
47. Following enquiries about SD letter 89 (7), SD letter 90 (13) was issued to confirm that there was no change in policy and guidelines for determining a nurse including whether an individual held a nursing qualification and that nursing qualification was required for the job. The second of these was clear that Nursery Nurses did not qualify for SCS. Difficult cases could be referred to the Branch for advice. It was NHS Pensions on behalf of the Secretary of State for Health, seeking advice from the Department of Health when necessary, who

would decide whether a grade would be deemed analogous to nursing and satisfies the SCS definition.

48. On the subject of whether there had been a change in policy NHS Pensions say SD letter 89(7) was issued to confirm to employers what would be considered as nursing duties for pension purposes. This was following enquiries from employers in respect of those undertaking nursing functions in the community. The reference to the possession of a nursing qualification having no bearing on the classification could cover the situation where, for example, a member may hold a nursing qualification but this is not a requirement for the role, e.g. a member with a nursing qualification undertaking a secretarial post and therefore the duties must be focussed upon rather than the fact that the member has a nursing qualification. It was acknowledged that SD letter 89(7) could have been interpreted to exclude some nurses and midwives not solely undertaking the duties listed. As this was not the intention the requirement for a nursing qualification was re-affirmed in SD letter 90(13).
49. As to the interpretation of the regulations, NHS Pensions say the following.
50. One way of interpreting the legislation would be to regard Nurse and Nursery Nurse as two distinct professions. In interpreting statute, the express mention of one thing should be regarded as excluding others. (For example, where a statute referred to “lands, houses and coalmines” the court held that it did not apply to limestone mines).
51. Alternatively, they suggest that “nurse” is too ambiguous to be safely interpreted and so I should apply the “Golden Rule” or the “Mischief Rule”.
52. They point to certain extracts from a 1938 Commons debate on the shortage of nurses to identify that at the time “children’s nursing” was regarded as a stepping stone, suitable for “girls”, towards adult nursing, suggesting the latter would be more onerous and evidently different.
53. Finally NHS Pensions suggest that I consider referring the matter to the court, as the legislation giving me my powers expressly permits.

## Observations by the Department of Health

54. We asked NHS Pensions whether the Secretary of State should not decide on the facts in any individual case whether a person is a nurse, rather than deciding that because of an individual's job title she cannot be a nurse according to guidance. They referred the question to the Department of Health who made the following comments.
55. The term "nurse" was not defined in the local government regulations and the same broad approach had been replicated in the Scheme's regulations. Opposite numbers in local government had confirmed that not everyone regarded/described as a nurse had been afforded early retirement terms and that for classification purposes the nature of the duties performed had been a key consideration.
56. There had previously been challenges to the rights of nursery nurses on the grounds that their roles now involved contact with both healthy and sick children. Reviews always sought to secure the consistency of SCS classification in line with pre-NHS rights. The right to take early retirement was preserved for those groups and individuals who had enjoyed these terms under their former employer's pension scheme.
57. In 1989 and 1990 there was a review in view of NHS changes generally. The Department consulted the Chief Nursing Officer and other NHS nurse leads and stakeholders. The Chief Nursing Officer said that focussing on arduous duties for SCS classification was less relevant and that a nursing qualification was more important. It was also noted that merely holding a qualification should not be the deciding criterion, but that there should also be a requirement for it in carrying out the person's duties.
58. The Department sought the views of the Chief Nursing Officer and others on Nursery Nurses in particular and were advised that most were concerned with routine caring duties, mainly for healthy patients. Some were beginning to take on duties that were more clinical in nature, but always under the supervision of a qualified senior nurse, allocating duties under the charge and care of doctors.

59. The Department also considered Ms Williams' position and said (with a detailed explanation) that they were satisfied that she would not have qualified for SCS either under the old criterion or the new criterion. (They noted that neither was ever intended to be the sole criterion.)
60. We also asked about the change in treatment of occupational health nurses in 1990 and how this was consistent with the SCS being a continuation of a historical provision. They said that the position of occupational health nurses in relation to SCS had also been the subject of representations to the Scheme. The review concluded that whilst these employees had not historically enjoyed SCS status this had been because their roles were not considered arduous, under the earlier main criterion. But the move to a criterion requiring the holding of a professional nursing qualification moved them squarely within the revised SCS criteria.

## Conclusions

61. In applying SCS NHS Pensions (and the Department of Health) have an unenviable task. The original provision, applying as it did to women only, was almost certainly based on a view of women's ability to take on arduous roles that would be regarded as extraordinary now. So it is unsurprising that, in trying to make it a useful and effective provision, the way that it has been applied has varied over time.
62. I am sure that NHS Pensions and the Department of Health have a greater understanding than I do of the tasks that a Nursery Nurse undertakes, how one may differ from other nurses and how the two terms "nurse" and nursery nurse" are generally understood. I should be wary of reaching a decision that would cut across such a general understanding.
63. I do not, however, think that a referral to the court is necessary. The interpretation of the statute and its application in a particular case is a matter which, as a dispute of law, is squarely in my jurisdiction.
64. NHS Pensions has said that SCS is a continuation of a historical provision and cannot be extended to other groups. They also say that their approach to such cases did not change in the period between 1988 and 1990. That appears to be at odds with what the Department of Health told the Pensions Ombudsman Service. The position in relation to Occupational Health nurses clearly changed in

1990. And their approach in determining SCS has changed in moving from placing the emphasis on whether a specific role was arduous to concentrating on the definition introduced in 1990 relating to qualification.

65. As a starting point the Regulations are to be interpreted and applied on the basis of what they say. They say that the provisions apply to a member who is in pensionable employment as a “nurse, physiotherapist, midwife or health visitor”, where “nurse” is not defined.
66. The Regulations must be interpreted purposively – that is, so that they can be given effect. And in the absence of a definition one might expect the term “nurse” to be given its ordinary meaning.
67. The “Golden Rule” to which NHS Pensions refer is usually understood to be that words are to be given their natural meaning unless the result is absurd. I can see no absurdity in this case. The question is simply what “nurse” means (and the answer, by the Golden Rule, is to be found in whatever it means naturally).
68. I do not find NHS Pensions reference to the “Mischief Rule” particularly helpful for similar reasons. If there is doubt as to whether the legislation applies in a particular case, one may – in cases of ambiguity – consider what the legislation was intended to achieve (that is, the mischief that it was intended to cure). If it is applicable at all then the “mischief” in 1939 was that certain female NHS employees were regarded as needing to be allowed to retire early because their jobs were arduous. That seems to me no longer to be relevant, as indicated by the later shift (whether rightly or wrongly applied) towards a qualification based test and the necessary inclusion of male staff.
69. The House of Commons speeches to which NHS Pensions refer cannot be used as an aid to interpretation under the rule in *Pepper v Hart* (which allows limited reference to Hansard in cases of ambiguity) because they are unrelated to the enactment in question. They might be relevant to understanding what “nurse” was generally understood to include (and exclude) in 1939, but that is hardly relevant because of a general principle that legislation should usually be interpreted according to the meaning of words as they change over time.
70. NHS Pensions’ suggestion that “Nursery Nurse” and “Nurse” are mutually exclusive terms, relating to different professions, might have had some force if the actual test had been whether a person was in a clearly closed set of people

that were obviously nurses when others were not. But in fact the test has shifted over time and there has been debate about who was to be included. And if occupational health nurses, midwives and nursing auxiliaries are (for the purposes of the legislation) species of “nurse”, why, in principle, can a nursery nurse not also be?

71. There is no reason not to operate a rule of thumb that holders of some posts are unlikely to be considered nurses – indeed the practical operation of the Scheme demands that. But an individual disputed case demands a proper consideration of whether the legislation has been correctly applied. In this case the origin of the dispute was apparently a mistake made in 1977. It may be that if Ms Williams had been told from the start that she did not qualify for SCS, and if none of her colleagues had either, she would have accepted that. But now that she is arguing that she does qualify for SCS, it must be considered.
72. In my view the decision as to whether Ms Williams was a nurse should have been made based on her individual case and the role that she performed. That decision was one for the Secretary of State (or a body with appropriate delegated authority) to make. As it stands her entitlement has been determined on a basis that is not in line with anything set out within the Scheme’s regulations. She was ruled out primarily because of her job title and qualifications. The correct test would have been whether a person with some knowledge of the field would describe her as a nurse.
73. Of course “nurse” has more than one meaning – but I have no doubt that in the case of the Regulations it should be given the sense that would normally be applied to it in the healthcare services.
74. The fact that Ms Williams worked in a nursery (inconveniently, a different use of a related word) is irrelevant to whether she should be regarded as a nurse. I should also add that it is possible that a person could hold a post described as “nurse” without actually being a nurse in the generally understood meaning of the word. That is to say, it is not the title that matters, but the activity.
75. The Oxford English Dictionary gives the following definition of “nurse” in the healthcare sense:  
  
“A person (historically usually a woman) who cares for the sick or infirm; (now chiefly) specifically a person professionally qualified for this

activity. Also: an assistant to a medical professional. Freq. with distinguishing word prefixed, as *dental, nit, veterinary nurse*, etc.”

76. I find that NHS Pensions’ approach of excluding Ms Williams on the grounds that Nursery Nurses had never been included was wrong. That they had never been included *might* have been a consequence of their usually not being nurses within the general understanding of the word (though I make no finding as to whether in normal circumstances a generic Nursery Nurse would fit within the general understanding). But such an understanding would not preclude Ms Williams – or any other Nursery Nurse – from being considered a nurse when their actual role was taken into account.
77. And it would also plainly be wrong to exclude Ms Williams on the grounds that she does not have a qualification from the Nursing and Midwifery Council or its predecessor. NHS Pensions recognises that such a qualification is not a prerequisite by including Nursing Auxiliaries and others whose roles are “analogous to nursing”. That approach is consistent with the OED definition, which records that a qualification is a commonly understood feature but not an essential one.
78. As should be clear from the way that I have approached the case, I am not making a decision that requires an opinion of what all Nursery Nurses do, and whether they should more generally be regarded as nurses. To add to my earlier remarks, I should be careful not to dismiss the knowledge that NHS Pensions and the Department will have of the general role of Nursery Nurse, when they apply a rule of thumb. I am confining my decision to the approach that I think should have been taken to applying the legislation and the result of doing so in the particular circumstances of Ms Williams.
79. Looking at the job description in place in 1995 (because Ms Williams would only qualify for SCS if she was a nurse at that time) I can see many features that are consistent with the OED’s “A person ... who cares for the sick or infirm” – particularly at item 4. (Ms Williams rightly stresses that on the neo-natal intensive care unit the babies are, by definition, sick.) I can also see that the job description of a Nursing Auxiliary that Ms Williams’ employer has provided has almost no duties that might be regarded as acting as a nurse.

80. Having taken into account the job descriptions and other evidence, in my view Ms Williams' role was one of nursing care (indeed it was clearly *more* of such a role than the Nursing Auxiliary). It was such a role in 1995 and, with some increase in duties later, it was still a nursing role at the time that Ms Williams retired.
81. So my decision is that Ms Williams is in fact entitled to SCS and I uphold her complaint.

**Directions**

82. Ms Williams is to be treated as nurse under Regulation R2. Within 28 days of the date of this determination NHS Pensions is to write to Ms Williams to confirm that she has been awarded SCS.
83. Within 28 days of the date of this determination NHS Pensions is to re-calculate the benefits that Ms Williams is entitled to and pay to her any arrears due plus interest. The interest referred to shall be calculated at the base rate for the time being quoted by the reference banks for the period from the date that her benefits became payable.
84. Within 28 days of the date of this determination NHS Pensions will also pay to Ms Williams the sum of £250 for the distress caused.

**Tony King**  
Pensions Ombudsman

10 March 2015