

Ombudsman's Determination

Applicant	Ms S
Scheme	NHS Pensions Scheme (the Scheme)
Respondent	NHS Business Service Authority (NHSBSA)

Outcome

1. Ms 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 can be upheld, NHSBSA should pay Ms S £1,000 for the distress and inconvenience she has suffered.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Ms S has complained that NHSBSA told her that she had Special Class Status (**SCS**) when she does not, which caused her to make decisions which she would not otherwise have made and caused her financial loss.

Background information, including submissions from the parties

4. The NHS Pension Scheme Regulations 1995 (as shown as an Appendix (**the Regulations**)), lay down that SCS was set up to allow a person who worked as a nurse, physiotherapist, midwife or health visitor the option to retire at age 55 without a reduction to their pension. On 6 March 1995, SCS was abolished. Members of the Scheme who remained in the same job role, which previously held SCS, and did not have a break in pensionable employment of over five years, were eligible to retain SCS.
5. On 4 February 2011, NHSBSA wrote to Ms S confirming that she held SCS and would be eligible to retire at age 55 with no reductions, as long as she continued to work in roles that attracted SCS.
6. On 14 August 2015, NHSBSA wrote to Ms S and said that the February 2011 letter was incorrect. On 6 March 1995, SCS had been abolished for new joiners and any member who had a five-year break in pensionable employment. Ms S' records showed that she was employed by Cornwall Partnership NHS Foundation Trust

(**Cornwall Partnership**) up to 13 January 1990. She then left and joined a GP practice. Ms S held SCS for her employment with Cornwall Partnership.

7. Ms S re-joined Cornwall Partnership five years and three months later, on 1 May 1995, which showed on her records as non-SCS. In order for her to have retained SCS throughout her employment, her break in service needed to be under five years.
8. NHSBSA said it understood that Ms S was informed that she could retain her SCS due to being employed by a GP practice during the break, but that was incorrect. It explained to her it would disregard a break in employment for all GP practice nursing staff for the period of 6 March 1995 to 1 September 1997 only. Ms S had a break in service between 14 January 1990 and 1 May 1995, which was greater than five years. She would have needed to re-join the Cornwall Partnership in January 1995 to retain her SCS.
9. Ms S wrote to NHSBSA. and said she was concerned that it was now trying to retract her SCS given that she was told in 2011 her SCS still applied.
10. Ms S instructed the Royal College of Nursing (**RCN**) to raise a complaint on her behalf through the Scheme's Internal Dispute Resolution Procedure (**IDRP**). RCN wrote to NHSBSA on 16 June 2016. It said Ms S was expecting to retire and receive a lump sum when she reached age 55. It said that for this reason Ms S had applied for roles which she thought would attract SCS. These roles paid lower salaries than other roles she believed she would have been able to secure, for example, other director roles. Ms S also made substantial changes to her mortgage, based on her understanding she would receive a lump sum when she retired at age 55. The RCN said, NHSBSA was aware of Ms S' break in service when it sent her the letter on 4 February 2011. Therefore, it had caused her unnecessary distress and inconvenience as a result.
11. NHSBSA responded to the RCN's letter on 9 August 2016, and said that Ms S was not eligible for SCS because of the five-year break in service.
12. RCN invoked stage two of the IDRP and made the following points:-
 - In late 2010, Ms S asked NHSBSA about her SCS. NHSBSA wrote on 4 February 2011 and said her SCS had been reinstated, and that she was eligible to retire at age 55, without reduction, provided she worked within a nursing position.
 - In 2013, when Primary Care Trusts were being dismissed, Ms S had to find a new role which fell within the criteria set out in the letter from NHSBSA.
 - Ms S applied for deputy nursing director posts despite these attracting a salary of some £15,000 and £25,000 lower than other director roles.

- Due to the letter issued on 4 February 2011, Ms S made decisions not to apply for a director post but to accept the deputy director of nursing role. This did not result in a loss of SCS but a significant drop in salary.
 - Ms S made substantial changes to her mortgage, increasing it significantly, because she believed she could retire at age 55, without an early retirement reduction, and she could use her benefits to settle her mortgage in 2018.
 - She provided financial support to her son who was attending university, on the basis of a tax free lump sum being received at age 55.
 - RCN suggested that NHSBSA should consider an award for the significant financial loss Ms S will face by not retiring at age 55.
13. NHSBSA responded to RCN on 14 November 2016, providing the stage two IDRP decision. It acknowledged that it provided incorrect information in the letter of 4 February 2011, but this error did not entitle Ms S to SCS. It offered £250 for the distress and inconvenience the incorrect information would have caused Ms S.
14. Ms S remained dissatisfied and brought her complaint to the Pensions Ombudsman.

Adjudicator's Opinion

15. Ms S' complaint was considered by one of our Adjudicators who concluded that further action was required by NHSBSA. The Adjudicator's findings are summarised briefly below: -
- NHSBSA provided incorrect information to Ms S on 4 February 2011, so there is no dispute that a problem has occurred.
 - The relevant section of the Regulations, which refers to SCS is R2. SCS was abolished in 1995, but members were able to retain SCS if they had not had a break in service of over five years. Ms S had a break in service between 13 January 1990 and 1 May 1995. As the break exceeded five years NHSBSA had complied with the Regulations.
 - NHSBSA wrote to Ms S on 4 February 2011. The letter incorrectly informed her that she held SCS and could retire from age 55 without early reduction to her pension. This amounted to maladministration, and it had to be decided if Ms S could argue reliance on the information to the extent that it would be unreasonable for NHSBSA to refuse her continued SCS.
 - Ms S made a number of arguments on how she had relied on the incorrect information. She said she did not apply for director roles and opted for a deputy director role instead to ensure she stayed within roles that were eligible for SCS. She said the salaries were £15,000 to £25,000 lower than the director roles. Although, Ms S believed she would have been successful in obtaining these roles,

it is difficult to say that she would have been successful in applying for the director positions.

- Further, Ms S said she made certain financial decisions on the basis that she would be eligible to retire at age 55, without a reduction, and receive a lump sum. These decisions related to providing financial support to her son during his university studies and reviewing her mortgage arrangement. However, the 2011 letter only mentioned a pension payable from age 55, it did not quote any lump sum figures at that time. So, it was not possible to say, on balance, that Ms S would not have made the same decisions.
- As there was no evidence Ms S would not have made the same decisions, her complaint falls to one of loss of expectation. Therefore, it needed to be considered how much distress and inconvenience would have been caused by the incorrect information. NHSBSA offered Ms S, £250 for the distress and inconvenience, but due to the significant impact the incorrect information would have caused, and the number of years before the error was corrected, the Adjudicator believed £750 should be awarded.

16. Ms S did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Ms S made the following comments: -

- She was dissatisfied that consideration was not given to the loss of SCS, due to no fault of her own.
- If she had been aware of the five-year rule during the time she was employed by Cornwall Partnership, she would have rectified that position before the five-year deadline.
- She relied heavily on the letter of 4 February 2011, and was surprised when she requested a forecast in 2015, that it did not include the option to retire at age 55.
- After numerous telephone calls Ms S said it was confirmed that the February 2011 letter was correct, then it was confirmed in writing that the February 2011 letter was incorrect.
- Ms S did not agree that the £750 award adequately reflected the three years of time it had taken to get the matter rectified.

17. NHSBSA also rejected the Adjudicator's opinion and the complaint was passed to me to consider. It believed the complaint did not warrant an award of £750 for distress and inconvenience. However, it acknowledged that it had been 18 months since the offer had been made. Therefore, it would be willing to award £500.

18. I agree with the Adjudicator's Opinion and I will therefore only respond to the key points made by Ms S and NHSBSA for completeness.

Ombudsman's decision

19. Ms S has argued that she relied on what she was told and made decisions that have caused her financial loss.
20. In order to establish a positive claim Ms S has to prove on the balance of probabilities that she made decisions which she otherwise would not have made. I have to assess what she was likely to have done without benefit of hindsight. On balance, I am not satisfied that Ms S can prove that if she had been told the correct information about her SCS status in 2011 she would not have taken out another mortgage or supported her son through university. I bear in mind that if she had known the correct position she would have been expecting to stay in work in receipt of her full salary for a further five years at the end of which she would have access to any lump sum which she may have been expecting at 55.
21. I accept that if she had been told the correct facts in 2011 she might have considered applying for other higher paid roles, but there is no evidence from which it is possible to assess the prospect of her obtaining one. I therefore cannot be satisfied on the balance of probabilities that she would have earned more than she did if she had not been given the wrong information in 2011.
22. Since the Adjudicator issued her opinion, Ms S has raised a new point. She says that had she known about the five-year rule at the time, she would have rectified her position to ensure she had not had a break in service greater than five years. This point did not form part of the initial complaint. It has not been the subject of IDRPs and has not been investigated. I therefore make no finding about it.
23. Although I am not satisfied that Ms S can prove financial loss, I appreciate that it is galling to make plans on the understanding that it is possible to retire at 55 with an unreduced pension only to find that it is in fact not possible. While there is no proof that Ms S would have obtained a more senior role than the one she now holds, I can see how the expectation of retirement on full pension at 55 may limit career ambition and result in regrets when a member finds out that they have to work on. There is no explanation of why the wrong information was given in 2011 and why it was not corrected until 2015. NHSBSA say only that they were unaware of the error until Ms S contacted them in December 2014. They appear always to have held the records necessary to understand that Ms S had no SCS status and were not prompt in making an adequate offer of compensation. I take these factors into account when considering the distress and inconvenience caused to Ms S. £500 is the minimum award in cases where there has been significant distress and inconvenience. In this case, because of the factors above, I am satisfied that a higher award is justified.
24. In my opinion Ms S should receive an award of £1,000 for the distress and inconvenience which she has suffered.
25. Therefore, I partly uphold Ms S' complaint and make the directions below with intention of remedying the non-financial injustice

PO-17532

Directions

26. Within 28 days of the date of this Determination, NHSBSA should pay Ms S £1,000 for the distress and inconvenience which she has suffered.

Karen Johnston

Deputy Pensions Ombudsman
18 September 2018

Appendix

NHS Pension Scheme Regulations 1995:

R2 Nurses, physiotherapists, midwives and health visitors

(1) Subject to paragraph (2), this regulation applied 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 right 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 he was so engaged has had a break in pensionable employment for any one period of 5 years or more, and

(b) Who spends the whole time of the last 5 years of his pension 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 period of 5 years or more coming into force of these Regulations.

(3) Where this regulation applies-

(a) Regulation E1 (normal retirement pensions) will apply to the member as if the reference in paragraph (1) of that regulation, at age 60, were a reference to age 55;