

Ombudsman's Determination

Applicant	Mrs S
Scheme	NHS Pension Scheme (the Scheme)
Respondents	NHS Business Services Authority (NHS BSA) NHS Wales Shared Services Partnership (the Employer)

Outcome

1. Mrs S' complaint against NHS BSA and the Employer 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, the Employer shall pay Mrs S £1,000 for causing serious distress and inconvenience. NHS BSA is not required to take further action.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mrs S' complaint against NHS BSA, the Scheme administrator, and the Employer, is that the former incorrectly told her, for several years, she had Special Class Status (**SCS**) in the Scheme, while the latter failed to correctly categorise her status in the Scheme at the outset, and gave NHS BSA incorrect information about this thereafter.

Background information, including submissions from the parties

4. In 1980, Mrs S joined the Scheme. Payment of Scheme benefits was governed by the National Health Service Pension Scheme Regulations 1995 (**the 1995 Regulations**). Mrs S' employer at the time (**the Employer**) told NHS BSA her employment should be categorised as "capacity code 1", the code for nurses in general. It also told NHS BSA that she was a "nursery nurse"
5. In April 2008, the Scheme was split into two parts (1) the 1995 Section for existing members and (2) the 2008 Section for new members.
6. In September 2011, NHS BSA sent Mrs S a personalised document, "Which NHS Pension path will you take - Your NHS Pension Choice Statement" (**the Choice Statement**). This gave two options (1) remain in the 1995 Section or (2) transfer benefits into, and join for future service, the 2008 Section. It also stated: -

“The normal pension age for the 1995 Section is 60, but as you are a member of the special class you have a right to retire from age 55 with an unreduced pension... For the 2008 Section the normal pension age is 65 if you retired at age 60 from this section your benefits are reduced to allow for them being paid for an extra 5 years.”

7. Around the same time, NHS BSA provided a general factsheet, “Your NHS Pension Choice Factsheet”. This stated: -

“Special Class and MHO status do not apply in the 2008 Section... . If you choose to stay in the 1995 Section... Special Class and MHO status would be protected up to the date any new arrangements are introduced. This would include the right to retire at age 55 and to have any increase in benefits available to take account of MHO service, provided existing conditions are satisfied at retirement...”
8. In June 2013, a document, “Special Class status factsheet (1995 Section only)” (**the Factsheet**) was made available to 1995 Section members. This stated: “Nursery Nurses and Physiotherapy Helpers are not included...”
9. In July 2015, at age 53, Mrs S contacted NHS BSA and asked about taking benefits under the Scheme at age 55. Around the same time, after making further enquiries, NHS BSA was informed by the Employer that Mrs S’ role did not qualify for SCS.
10. In December 2015, Mrs S received a response from NHS BSA stating that, since she was a nursery nurse, she was not entitled to SCS, and therefore she did not have the right to retire at age 55 without reduction.
11. In March 2016, NHS BSA contacted Mrs S and asked her to provide a copy of her job description, which she did. In June 2016, NHS BSA wrote to Mrs S again, stating that it was reviewing her request to take unreduced benefits at age 55.
12. In July 2016, following a complaint decided by the Pensions Ombudsman in 2015, the High Court upheld an appeal from NHS BSA regarding SCS. It held, in summary, that the Scheme member, a nursery nurse, was not “in pensionable employment as a nurse” according to the meaning of Regulation R2 of the 1995 Regulations.
13. In June 2017, Mrs S complained under the Scheme’s Internal Dispute Resolution Procedure (**IDRP**). In August 2017, NHS BSA responded under stage one IDRP: -
 - The High Court case established that nursery nurses were not entitled to SCS, so it was unable to uphold this part of Mrs S’ complaint.
 - The Employer incorrectly informed NHS BSA that Mrs S had SCS. As a result, when NHS BSA issued her a Choice Statement in September 2011, this incorrectly included a comparison of possible (unreduced) benefits at age 55.
 - It was unfortunate that the statement contained incorrect information. But it was based on information from the Employer, so NHS BSA was not responsible.

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- As Mrs N did not have SCS, she could not take unreduced benefits at age 55; her normal retirement age was 60.

14. In October 2017, Mrs S appealed. The key points were: -

- She enclosed a copy of the Factsheet, which stated that nursing qualifications were not always required to qualify for SCS. The important factor was, whether the member was working “in a nursing capacity”.
- When she started working as a nurse in 1980, she was awarded SCS as evidenced by, among other things, capacity code 04 being on her joiner form. The Choice Statement also clearly included her name and employment.
- She asked why NHS BSA did not question her SCS, when it knew she was a nursery nurse. She was assured, based on various figures she had received, that it would be possible for her to retire at age 55 with unreduced benefits.
- Had she been correctly informed that she did not have SCS, she would have acted differently, e.g. by making additional pension contributions (or saving more).

15. In November 2017, NHS BSA responded under stage two IDR, as follows: -

- The result of the High Court case showed that NHS BSA’s decision not to extend the benefits of SCS to members whose job title was “nursery nurse” was correct.
- The Factsheet was no longer relevant as it pre-dated the High Court case. An updated factsheet was now available, which reflected the correct position.
- NHS BSA did not query the information it received from the Employer as grades which are automatically entitled to SCS are recorded on its system as capacity code 1. When her joiner form was received by NHS BSA in 1980, the Employer used capacity code 1, not capacity code 4. As its system records members’ capacity codes, but not job titles, it was not practicable for NHS BSA to have queried this.
- The Choice Statement reflected the information NHS BSA held for Mrs S at the time, but she could change that choice now if she wished.

16. In March 2018, Mrs S referred her complaint to this Office.

17. In April 2018, the Employer provided its formal response. The key points were: -

- The original records were no longer available but it did not doubt that the capacity code reflecting SCS was entered on Mrs S’ payroll record incorrectly, and communicated to NHS BSA thereafter.
- But it was unable to confirm whether the error was due to its misunderstanding the Scheme Regulations, or whether the Regulations were unclear.
- The Employer would not have questioned a member’s eligibility for SCS unless there was some reason to do so.

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- Projections provided to Mrs S since July 2015 correctly quoted a normal retirement age of 60; any projections quoted to age 55 correctly included an actuarial reduction.
- Mrs S said she should be awarded SCS as the nature of her employment entitled her to this. But the High Court case was clear that nursery nurses do not qualify for SCS.
- The Employer apologised sincerely for the error, and the distress and inconvenience caused.

18. In May 2018, Mrs S' representative, Mr Fox, made the following key points: -

- Mrs S was informed, when she started working for the NHS, that she would qualify for SCS due to the "demanding" nature of the job.
- He queried why "Auxiliary nurses" qualified for SCS but nursery nurses did not. He also referred to the Factsheet, which stated nursing qualifications were not always required; the key factor was whether the member worked in a "nursing capacity".
- The Employer was unaware that, in 1980, nursery nurses did qualify for SCS. Further, if it were true, as the Employer claimed, that the Department of Health clarified in 1988 that nursery nurses were excluded from SCS, the Employer should have amended her pension documents accordingly.
- When she received the Choice Statement in 2011, she was reassured that she would be able to retire at age 55 with unreduced benefits; this further assured her she would be able to retire early and take care of her elderly parents.
- The Choice Statement stated that her benefits had been calculated using the most up to date information. However, she was not informed of the correct position until 2015, when she enquired about early retirement, 35 years after she joined the Employer.

Adjudicator's Opinion

19. Mrs S's complaint was considered by one of our Adjudicators, who concluded that no further action was required by NHS BSA, but, that further action was required by the Employer. The Adjudicator's findings are summarised briefly below: -

- The High Court decided that nursery nurses were not entitled to SCS, and this Office would be unable to overrule that decision. Mrs S argued that the important point was whether the member was working in a nursing capacity. The Adjudicator considered this, but was satisfied that the correct position was, she was not entitled to SCS.
- The Employer did not dispute that it provided the wrong capacity code to NHS BSA in 1980, when Mrs S joined the Scheme. And, under the Employer charter it was for the Employer to supply NHS BSA with correct information regarding members' status. So, the complaint originated in an administrative error by the Employer. And whilst it would have been possible for NHS BSA to have discovered the error, it was not reasonable for it to do so.

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- Mrs S said, NHS BSA received clarification, in 1988, that nursery nurses did not qualify for SCS, and should have so informed her. There was no evidence that NHS BSA was so informed but, even if it was, it was not material to the outcome. NHS BSA explained, and the Adjudicator accepted, it did not administer members' benefits on the basis of job titles; it used capacity codes. Therefore, NHS BSA did not necessarily know any clarification of nursery nurses' entitlement would affect Mrs S, as its records were limited to the job code the Employer had provided to it.
- Nor was it reasonable for Mrs S to have known she did not have SCS. She would have received a number of documents, e.g. the Choice Statement, which incorrectly stated that she did. There was also no sign of disclaimers that she should not rely on such information. So, it was reasonable for her to assume that she did in fact have SCS.
- If the Choice Statement had been correct, i.e. based on the correct capacity code, it would not have included a projection of unreduced benefits to 55. So, the Adjudicator said he needed to decide whether, if Mrs S had received a correct Choice Statement, without such a projection, she would have transferred to the 2008 Section, or remained in the 1995 Section, (and whether she would have otherwise acted differently).
- Mrs S said it was always her intention to retire as early as possible due the demanding nature of working in the NHS, and because she wanted to have more flexibility later in life, to look after her elderly parents, among other things. She also said, her completion of the Choice Statement to remain in the 1995 Section, showed she always wanted to access her pension benefits flexibly.
- The Adjudicator considered this, but did not think Mrs S would have acted differently with the correct information. There was no possibility of Mrs S' taking an unreduced pension from age 55 under the 2008 Section. And, generally, the 2008 Section was, on the face of it, no more generous than the 1995 Section. So, he considered that if Mrs S had received a correct Choice Form in 2011, on the balance of probabilities she would have made the same decision to remain in the 1995 Section.
- But Mrs S also said that, if she had known she did not have the right to an unreduced pension from age 55, she would have made extra pension provision. She said that she could have afforded to contribute an additional £150 a month into a pension plan, but was not informed until 2015 that she did not have SCS, by which time it was too late for her to mitigate her loss. But the Adjudicator said that there was insufficient evidence to show that she would have made extra provision from 2011 onwards, or other times. In any case, the notional £150 a month had not been lost; Mrs S had had the benefit of it, albeit via spending that would not otherwise have been made, and/or debts or liabilities that would not otherwise have been reduced or paid off.
- In summary, the Adjudicator did not think Mrs S would have acted differently had she received correct information; he said she had suffered a loss of expectation, causing distress and inconvenience, but not an actual financial loss.

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- As Mrs S would have to continue working for an indefinite period, the level of distress and inconvenience she had suffered met the Ombudsman's "serious" tariff, i.e. £1,000. So, the complaint should be upheld in part and the Employer should pay her this sum.
20. NHS BSA and the Employer accepted the Adjudicator's Opinion, but Mrs S did not, and the complaint was passed to me to consider. Mrs S provided further comments, which do not change the outcome. I agree with the Adjudicator's Opinion and I will therefore only respond to the key points made by Mrs S for completeness.

Ombudsman's decision

21. Mrs S said she had reviewed the Adjudicator's Opinion, but had no further evidence to assist her case. She said she was disappointed with the Opinion and the fact that she had been incorrectly informed, for her whole working lifetime, that she had SCS when this was not actually the case.
22. Mrs S did not deny that the Factsheet in June 2013 clarified that nursery nurses were not actually entitled to SCS, however she said she received no correspondence from NHS BSA to inform her of this. Nor did the Employer communicate this information to her at the time, or thereafter. I have considered this.
23. I do not find that NHS BSA was under an obligation to personally inform affected members, e.g. nursery nurses and physiotherapy helpers, that they were not entitled to SCS, not least because the coding system made it impossible for them to identify affected individuals.
24. The Employer seems to have missed an opportunity, in around 1988 and again in 2013, to update Mrs S' capacity code, after the Department of Health confirmed that nursery nurses were excluded from SCS and to tell her about her lack of entitlement. I find this was an administrative error. However, for reasons that I go onto explain below, I do not find that it caused an actual financial loss.
25. Mrs S disagrees with the Adjudicator's conclusion that she would not have acted differently with the correct information. She says she has been denied the opportunity to correct the shortfall between what her reduced pension will be at age 55, and what it would have been had it been paid unreduced. She is also unhappy because no-one is being held to account for the incorrect information she has received over the years.
26. I sympathise with Mrs S. However, whilst there is no doubt that she has been given incorrect information about her status in the Scheme, I can only direct the responsible party to pay redress where I am satisfied she would have acted differently with the correct information. I find that, in particular, had she received the correct information in 2011, during the choice exercise, she would still have chosen to remain in the 1995 Section, there being no clear benefit in her transferring to the 2008 Section.

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27. In general, I find that, on the balance of probabilities, Mrs S would not have acted differently had she been informed, prior to the choice exercise, that she did not have SCS in the Scheme.
28. I appreciate that Mrs S believes, now, she has been denied the opportunity to correct her shortfall, i.e. that she could have afforded to build up, perhaps by way of a private pension, a pension in the amount of the reduction she will face if she chooses to take reduced benefits before age 60. However, I must make a decision without the benefit of hindsight. I have not been provided with any evidence that Mrs S was in fact saving £150 per month out of her salary. Accordingly, I find, on the balance of probabilities, there is insufficient evidence that she would have contributed this additional monthly amount.
29. In any case, I agree that the notional £150 has not been lost. Rather, Mrs S has had the benefit of it, albeit through increased spending elsewhere, or reducing/paying off debts.
30. However, I find that Mrs S has suffered a loss of expectation, and serious distress and inconvenience, as she will receive a lower pension than she was expecting; or, will have to continue working until age 60 if she wishes to receive her pension in full. Since the error originated with the Employer, it should pay Mrs S £1,000 to recognise this. As NHS BSA could not reasonably have discovered the error, it is not required to take further action in this instance.
31. Therefore, I uphold Mrs S's complaint in part.

Directions

32. Within 21 days of the date of this Determination, NHS Wales Shared Services Partnership shall pay Mrs S £1,000 for serious distress and inconvenience.

Karen Johnston

Deputy Pensions Ombudsman
23 November 2018