

## Ombudsman's Determination

Applicant	Miss S
Scheme	NEST ( <b>the Scheme</b> )
Respondent	Dapa Coffee Formby Ltd ( <b>Dapa Coffee</b> )

## Outcome

1. Miss S' complaint is upheld and, to put matters right, Dapa Coffee shall pay Miss S £500 for the significant distress and inconvenience she has experienced.

## Complaint summary

2. Miss S complained that Dapa Coffee deducted pension contributions from her wages but failed to pay them into the Scheme. Miss S said Dapa Coffee failed to pay employee and employer's contributions, amounting to £1,220.28, between November 2021 and February 2023.
3. Although both parties agree that the contributions have now been paid, there is a dispute as to whether a payment for non-financial loss is required.

## Background information, including submissions from the parties

4. In September 2021, Miss S began employment with Dapa Coffee. Her contract of employment stated that she would be auto enrolled into the Scheme.
5. From November 2021, pension contributions were deducted from Miss S' wages but not paid into the Scheme.
6. Around December 2022, Miss S became aware of the unpaid pension contributions.
7. On 21 February 2023, Miss S left employment with Dapa Coffee. At this point, pension contributions were still owed to the Scheme.
8. On 19 March 2023, Miss S wrote to Dapa Coffee to chase her unpaid contributions. She said that she was prompted to do this after speaking with the Scheme administrator, who said it could still not locate her account. In its response, Dapa Coffee advised her that the issue was being rectified.
9. On 11 April 2023, Miss S brought her complaint to the Pensions Ombudsman (**TPO**).

10. On 15 August 2023, TPO wrote to Dapa Coffee and asked for more information in response to Miss S' complaint.
11. On 31 August 2023, TPO repeated the request for information. On the same day, Dapa Coffee replied and accepted the complaint. It advised that it had passed payroll to its accountant (**the Accountant**) who would rectify the error immediately. TPO requested an update within two weeks.
12. On 29 September 2023, TPO chased Dapa Coffee for an update and provided a deadline of 5 October 2023.
13. On 18 October 2023, TPO wrote to Dapa Coffee and said that, in the light of its failure to respond, the case was proceeding formally.
14. On 20 October 2023, the Accountant wrote to TPO and apologised for the lack of response. He advised that he had started the process of recording the unpaid contributions with the Scheme. The Accountant provided a record of Miss S' unpaid contributions from January 2022 to February 2023. TPO replied and said that unpaid contributions were claimed from November 2021, the Accountant requested the payslips for November 2021 and December 2021.
15. Miss S provided TPO with her payslip for November 2021, but did not have a payslip for December 2021. The November 2021 payslip was shared with the Accountant who advised that he had processed payments for January 2022 and February 2022. The Accountant told TPO that the Scheme administrator could take up to five working days to process and collect the payment and that Dapa Coffee would make two weekly payments until the contributions were paid.
16. On 28 October 2023, Miss S said that no payments showed in her account. She said that she was concerned that payments were to be paid on a weekly basis and was worried the Dapa Coffee would not stick to the repayment schedule. So, she requested a formal investigation.

## **Caseworker's Opinion**

17. Miss S' complaint was considered by one of our Caseworkers who concluded that further action was required by Dapa Coffee as it had failed to remit the contributions that were due to the Scheme. The Caseworker's findings are summarised below:-
  - The Caseworker stated that TPO's normal approach, in cases such as these, was to seek agreement from all parties on the facts of the complaint, including the dates and amounts of contributions involved. In this case, Dapa Coffee had responded to TPO's communications and had agreed that some of Miss S' pension contributions were still outstanding. So, there was no dispute that maladministration had occurred, and that Miss S was disadvantaged as a result.
  - Dapa Coffee had offered to make weekly payments until contributions were up to date. Miss S told TPO that she had no confidence in Dapa Coffee and was

concerned that it would default on the payments. She said that contributions had been outstanding for two years and she wanted payment in full.

- In the Caseworker's view, Miss S had suffered significant distress and inconvenience as a result of Dapa Coffee's maladministration. The Caseworker was of the opinion that an award of £500 for non-financial injustice was appropriate in the circumstances.

18. Miss S agreed with the Caseworker's Opinion on 8 November 2023.
19. On 22 November 2023, she told TPO that she had not received anything from Dapa Coffee.
20. On 23 November 2023, Dapa Coffee agreed with the Caseworker's Opinion.
21. On 4 January 2024, Miss S contacted TPO and said that some of her contributions had not been paid. She also said that Dapa Coffee had failed to pay the investment loss or the award for distress and inconvenience.
22. On 5 January 2024, TPO sought an update from Dapa Coffee about the implementation of the Opinion. TPO requested that Dapa Coffee reply by 12 January 2024, but no response was received.
23. On 18 January 2024, Dapa Coffee replied to TPO and said that, once it had identified the errors, the process was moved to the Accountant, who spent considerable time correcting the error. Dapa Coffee said that this was done in a reasonable timeframe and it had taken steps to ensure a correct process was implemented for the future. In addition, Dapa Coffee said that it was a small, independent business and it did not have the funds to fully rectify the issue.
24. Dapa Coffee said that it had corrected the maladministration and unreservedly apologised to Miss S. Dapa Coffee, however, objected to the award for distress and inconvenience because it said it was not required, Dapa Coffee told TPO that there was no cost incurred or damage to property or anything else of value. Dapa Coffee had checked with a pension adviser, who had advised that the investment loss was no greater than £50 accrued interest and that it had made this payment as a gesture of goodwill. Dapa Coffee said that, if this was not acceptable, it would seek legal advice.
25. On 26 January 2024, TPO responded to Dapa Coffee's objections. TPO explained that the Pensions Ombudsman did have the power to make awards for distress and inconvenience. TPO said that this was explained in the factsheet that was shared with Dapa Coffee on 15 August 2023. Miss S' contributions had been deducted from November 2021 and were still unpaid when Miss S left employment on 21 February 2023. Miss S had brought the issues to Dapa Coffee's attention before approaching TPO. The unpaid contributions had caused Miss S distress and inconvenience, and Miss S' pension was clearly of value to her. TPO reminded Dapa Coffee that it had

accepted the Opinion, and no objections were made at that stage, so it ought to comply with its terms. TPO asked Dapa Coffee to confirm how it wished to proceed.

26. No response was received to TPO's email of 26 January 2024. In the light of this, TPO chased Dapa Coffee on 7 February 2024 and on 22 February 2024.
27. On 29 February 2024, TPO informed Dapa Coffee that the case would be passed to the Ombudsman for a Determination.
28. On 1 March 2024, TPO asked Miss S to confirm the investment loss or to request the Scheme to calculate the loss. Subsequently, Miss S said that it would take time for the Scheme to calculate this. She said that there was an additional £50 payment in the account which Dapa Coffee had told TPO it had paid in relation to the interest. Miss S said she accepted that the financial loss element of the complaint was now resolved. But, she said she was still owed £500 for the non-financial loss.
29. On 6 March 2024, TPO attempted to call Dapa Coffee who requested a call back.
30. On 7 March 2024, TPO managed to speak with Dapa Coffee who made further objections to the compensation payment. Dapa Coffee also challenged TPO's understanding that Dapa Coffee had accepted the Opinion.
31. On 8 March 2024, TPO emailed Dapa Coffee with a copy of its email agreement to the Opinion. TPO told Dapa Coffee that the case would be submitted to the Ombudsman for a decision, and therefore any further comments ought to be submitted imminently. TPO confirmed its understanding of Dapa Coffee's objections were as follows:
  - Dapa Coffee was a small, independent business. It said it had electricity and gas bills to pay, and the £500 compensation was a draconian decision.
  - Not paying the contributions was a mistake, which Dapa Coffee had now rectified, yet it was still being penalised by TPO.
  - Dapa Coffee alleged that making the payment would make it go out of business.
  - Dapa Coffee said it was devastated about the mistake, and it had apologised for the error.
  - Dapa Coffee said that as soon as it was told about the error, it spoke to the Accountant who rectified the situation.
32. On 11 March 2024, Dapa Coffee wrote to TPO and confirmed that TPO's understanding of Dapa Coffee's objections were correct. Dapa Coffee conceded that the Opinion had been accepted but the attachment with the Opinion had not uploaded on Dapa Coffee's phone. It said that it hadn't understood that the Opinion suggested an award in recognition of distress and inconvenience.

## **Ombudsman's decision**

33. Miss S complained that Dapa Coffee had not paid all the contributions due to her Scheme account.
34. By the time this case was passed to me to consider, Dapa Coffee had taken remedial action to pay the missing contributions. Miss S told TPO that there were minor discrepancies in the figures, but that she accepted that payments had been made, which brought her Scheme account up to date. However, she said that the non-financial loss payment was still outstanding.
35. There was no dispute that that employee contributions were deducted but held back by Dapa Coffee and not paid into the Scheme. Dapa Coffee accepted that it had failed to pay Miss S' contributions and agreed with the Opinion issued on 8 November 2024. Subsequently, Dapa Coffee said that it had not realised the terms of the opinion included an award for distress and inconvenience and it saw no reason why such a payment was required. However, ignorance of the terms of the Opinion is no defence or a reason why Dapa Coffee should not make the award for distress and inconvenience to Miss S.
36. I have considered Dapa Coffee's objections to the award for distress and inconvenience, but it is clear that there was a significant delay in remitting contributions to the Scheme. I acknowledge that the contributions have now been paid. However, Dapa Coffee's failure to pay the employee and employer contributions into the Scheme amounted to unjust enrichment which had caused Miss S to suffer financial loss.
37. It is clear that Miss S would have suffered significant distress and inconvenience at the thought of her pension contributions being lost and whilst waiting a considerable time for the matter to be resolved, and so is entitled to an award for the non-financial injustice.

## **Directions**

38. To put matters right, Dapa Coffee shall, within 28 days of the date of this Determination, pay Miss S £500 for the significant distress and inconvenience she has experienced.

**Anthony Arter CBE**

Deputy Pensions Ombudsman

12 April 2024