CAS-112556-G7J4

Ombudsman's Determination

Applicant	Mr D
Scheme	NEST Pension Scheme (**the Scheme**)
Respondents	Red Bus Bistro (**the Employer**)

Outcome

1. Mr D's complaint is upheld and to put matters right the Employer shall pay £259.86 into the Scheme. The Employer shall ensure that Mr D is not financially disadvantaged by its maladministration. So, it shall arrange for any investment loss to be calculated and paid into the Scheme.

2. In addition, the Employer shall pay Mr D £500 for the significant distress and inconvenience it has caused him.

Complaint summary

3. Mr D has complained that the Employer failed to deduct pension contributions from his pay. The Employer also failed to pay its employer contributions into the Scheme.

4. The available evidence shows that the employee's pension contributions amounted to £259.86. It is also noted that Mr D is unable to cover the missed employee pension contributions.

Background information, including submissions from the parties

5. The sequence of events is not in dispute, so I have only set out the salient points.

6. Mr D commenced employment with the Employer in August 2021.

7. On 29 September 2021, the Employer sent an email to its accountant, headed 'Payroll 2021'. That message stated that the new starters were not to be included in the pension scheme as they wished to opt out.

8. On 19 November 2021, Mr D received a welcome letter from the Scheme administrator, which confirmed that he had been enrolled with effect from that date.

9. On 25 April 2022, Mr D's membership with the Scheme ended.

10. In July 2023, Mr D's employment ceased.

11. Mr D said he became aware of a problem on 4 August 2023 when checking his financial records.

12. On 3 November 2023, Mr D complained formally to the Employer about his pension.

13. On 6 November 2023, the Employer responded to Mr D's complaint and referred him to its email of 29 September 2021.

14. On the same day, Mr D told the Employer that he had not opted out of the Scheme and that it had not provided a copy of a 'signed opt out letter' showing that he had chosen to do so.

15. On 7 November 2023, the Employer acknowledged that its email, to the accountant in September 2021, did not specifically name Mr D. The Employer said it would calculate the amount of unpaid employee pension contributions and tell Mr D how he could pay them. The Employer also said that once Mr D had paid his contributions to the Scheme, then it would pay the employer contributions into the Scheme.

16. On 23 November 2023, the Employer told Mr D that the outstanding employee contributions were £1,569.44. An employer contribution total was not provided to Mr D.

17. On the same date, Mr D told the Employer that he wanted it to pay the total of the employee and employer pension contributions into the Scheme. He also asked that it pay compensation for the hardship caused to him by the contributions not having been paid.

18. On 24 November 2023, the Employer repeated to Mr D that it would pay its employer pension contributions into the Scheme once he had provided evidence that he had paid his employee contributions. The Employer declined Mr D's request for compensation.

19. On 25 November 2023, Mr D's complaint was formally referred to The Pension Ombudsman (**TPO**).

20. On 21 May 2024, Mr D told TPO the following:-

    - His employment was between August 2021 and July 2023
    - He was in financial hardship so was unable to pay the outstanding employee pension contributions.
    - He had never received any correspondence that stated he had opted out of the Scheme.

21. On 19 June 2024, TPO asked the Employer to evidence how it had complied with The Pension Regulator's (**TPR**) Auto-Enrolment Regulations, Section 7 - Opting out, as shown in Appendix One.

22. On 25 June 2024, the Employer told TPO that in keeping with General Data Protection Regulations (**GDPR**) it no longer held Mr D's personal (HR) file. It said that during his 23 months of employment he did not raise the issue about pension deductions. The Employer added it was the responsibility of an employee and employer to ensure this was managed, and so Mr D should have queried the non-deductions of pension contributions from his pay.

23. On 23 August 2024, TPO told the Employer that Mr D was not able to make up the employee pension contributions for the period November 2021 to April 2022.

24. On 5 February 2025, the Scheme administrator told TPO that Mr D's enrolment ended on 25 April 2022. The Scheme administrator also later provided TPO with a copy of its correspondence, of 25 April 2022, acknowledging the Employer's instruction, via a contribution schedule, that there were no further contributions payable to the Scheme for Mr D.

25. On 6 February 2025, TPO asked the Employer to provide information about Mr D's opt out and the instructions sent to the Scheme administrator. The Employer did not respond to TPO.

26. On 25 February 2025, the Scheme administrator told TPO that Mr D's preferred mode of communication was given as electronic and its letter to him of 25 April 2022, titled 'You're no longer contributing to Nest through your employer' was issued into his secure inbox with it.

27. Mr D was therefore enrolled in the Scheme between 19 November 2021 and 25 April 2022, but he was unable to provide TPO with copy payslips for this period.

28. Mr D provided TPO with a screenshot of his gross taxable income figures which the Employer had submitted to HM Revenue & Customs (**HMRC**) for the months November 2021 to April 2022.

29. On 8 July 2025, TPO asked the Employer to provide the figure it had calculated as Employer pension contributions that should have been paid into the Scheme. It was also told that under the Pensions Act 2008 employer pension contributions were not conditional on an employee making their payments. TPO did not receive a response.

Adjudicator's Opinion

30. Mr D's complaint was considered by one of our Adjudicators who concluded that further action was required by the Employer as, while it did not deduct pension contributions from his pay, it had failed to remit its employer contributions that were due to the Scheme. The Adjudicator's findings are summarised below:-

    - 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. He said that, after initially setting out a settlement proposal to Mr D, and responding to TPO's earlier email correspondence, the Employer later failed to engage to agree an action plan to address Mr D's complaint.

- The Employer's position was that Mr D opted out of joining the Scheme, however, it had not provided TPO with documentation specific to him, to support its response to his complaint.

- Under the Rules of the Scheme (**the Scheme Rules**) the Employer was obliged to pay to the Scheme, at least 8% of Mr D's qualifying earnings in the relevant pay reference period, with 5% being from employee contributions and 3% as employer contributions.

- Mr D had explained that he was unable to make up the employee pension contributions which should have been deducted from his pay between November 2021 and April 2022. However, while Mr D could not make up the unpaid employee contributions, there remained a legal obligation on the Employer, under Section 20 of the Pensions Act 2008, to meet its employer contributions of 3% to the Scheme.

- In the absence of copy payslips from Mr D, the employer contributions were calculated based on a balance of probabilities from the monthly gross figures the Employer submitted to HMRC for the period November 2021 to April 2022. So, as Mr D's enrolment began on 19 November 2021 and ended on 25 April 2022, a pro-rata employer contribution was calculated for those two months.

- Based on the information provided by Mr D, employer contributions totalling £259.86 had not been remitted into his Scheme account. As a result of the Employer's maladministration, Mr D was not in the financial position he ought to be in.

- In the Adjudicator's opinion, Mr D has suffered significant distress and inconvenience because of the maladministration from the Employer.

31. Following the Opinion, the Scheme Administrator told TPO that while it amended Mr D's Scheme account on 25 April 2022, to show that he was no longer enrolled by the Employer, it had been told the effective date of contributions ending was 6 February 2022.

32. The Employer did not respond to the Adjudicator's Opinion and the complaint was passed to me to consider. I agree with the Adjudicator's Opinion.

Ombudsman's decision

33. Mr D has complained that the Employer has not paid all the contributions due to his Scheme account.

34. Under Automatic Enrolment Regulations, an employer is required to retain clear records where an employee decides to opt out of a pensions scheme and stop

making pension contributions. In Mr D's case he has complained that he did not opt out of the Scheme. The only evidence the Employer has provided is an internal email dated 29 September 2021, which referred in general terms to unnamed new employees not wishing to be enrolled into the Scheme. This email did not identify Mr D specifically. In addition, the Employer did not respond to TPO's request for documentation directly confirming that Mr D had opted out of the Scheme. On that basis, I find that there is not any clear or reliable evidence to demonstrate that Mr D did in fact opt out of the Scheme.

35. Under the Scheme Rules the Employer was obliged to pay to the Scheme, at least 3% of Mr D's qualifying earnings in the relevant pay reference period, and the employer and employee contributions must amount to at least 8% of Mr D's qualifying earnings in the relevant pay reference period. The relevant provisions of the Scheme Rules are outlined in Appendix Two.

36. Mr D is now unable to make up the employee contributions which were not deducted from his pay. In the absence of copy payslips, based on the information the Employer submitted to HMRC about his gross monthly income, I find that employer contributions totalling £259.86, as outlined in Appendix Three, were not remitted into his Scheme account.

37. The Employer acted in breach of the Scheme Rules by not paying all the contributions due between November 2021 and April 2022. Whilst the Employer did make an offer to pay the outstanding employer pension contributions, its responsibility to pay employer contributions was not subject to Mr D first paying the employee contributions it had failed to deduct from his pay.

38. The Employer's failure to pay the employer contributions into the Scheme amounts to unjust enrichment and has caused Mr D to suffer a financial loss. The Employer shall take remedial action to put this right.

39. Mr D is entitled to a distress and inconvenience award in respect of the significant ongoing non-financial injustice which he has suffered. This was exacerbated by its failure to fully engage during TPO's investigation into Mr D's complaint.

Directions

40. To put matters right, the Employer shall within 28 days of the finalisation of this complaint: -

    (i) pay Mr D £500 for the significant distress and inconvenience he has experienced.

    (ii) pay £259.86 into Mr D's Scheme account. This figure represents the employer contributions, which should have been paid into the Scheme for the period 19 November 2021 to 25 April 2022.

    (iii) establish with the Scheme administrator whether the late payment of contributions has meant that fewer units were purchased in Mr D's Scheme account than he would have otherwise secured, had the contributions been paid on time; and

(iv) pay any reasonable administration fee should the Scheme administrator charge a fee for carrying out the above calculation.

41. Within 14 days of receiving confirmation from the Scheme administrator of any shortfall in Mr D’s units, pay the cost of purchasing any additional units required to make up the shortfall.

Camilla Barry

Deputy Pensions Ombudsman
10 September 2025

Appendix One

Auto enrolment

Employer duties and defining the workforce: An introduction to the employer duties

Record-keeping requirements

70. It is a requirement that both employers and pension schemes keep records of opt-outs and are able to produce them, if the regulator asks to see them.

71. Keeping such records also helps an employer should there be any dispute as to whether or not an individual has opted out.

For employers

72. Employers must keep the original or a copy of all opt-out notices for four years. The notices can be stored in paper format or electronically."

Appendix Two

NEST Scheme Rules

Rule 7.1.1

Where in respect of a member a participating employer has elected to use the Scheme to:

1. (a) fulfil its duties under:(i) in relation to Great Britain, section 2(1) (by virtue of section), 3(2), 5(2) or 7(3) of the 2008 Act; or(ii) in relation to Northern Ireland, section 2(1) (by virtue of section), 3(2), 5(2) or 7(3) of the 2008 NI Act), or

1. (b) arrange for a worker to become a member of the Scheme within article 19(2A) of the Order,

from the date that admission to membership or the making of contribution arrangements in relation to that member takes effect, the participating employer shall pay and the Trustee shall accept such contributions as may be required in order for the Scheme to meet the quality requirement referred to in Part 1 of the 2008 Act (Part 1 of the 2008 NI Act), or the alternative requirement referred to in Part 1 of the 2008 Act (or Part 1 of the 2008 NI Act), in relation to the member, having regard to the contributions being paid by the member under rule 9.1.

Section 20 Pensions Act 2008

20 Quality requirement: UK money purchase schemes

(1) A money purchase scheme that has its main administration in the United Kingdom satisfies the quality requirement in relation to a jobholder if under the scheme—

(a) the jobholder's employer must pay contributions in respect of the jobholder;

(b) the employer's contribution, however calculated, must be equal to or more than 3% of the amount of the jobholder's qualifying earnings in the relevant pay reference period;

(c) the total amount of contributions paid by the jobholder and the employer, however calculated, must be equal to or more than 8% of the amount of the jobholder's qualifying earnings in the relevant pay reference period.

Appendix Three

Payslip date	HMRC monthly taxable gross pay	Employer pension contribution
*30/11/21	£1,836	†£14.48
31/12/21	£1,464	£28.32
31/01/22	£2,543.64	£60.69
28/02/22	£2,340	£54.60
31/03/22	£2,340	£54.60
**30/04/22	£2,407.50	†£47.17
Total		**£259.86**

* Enrolled into Scheme on 19 November 2021.

**Enrolment with Scheme ended 25 April 2022.

† In the absence of payslips, figures calculated by TPO on a balance of probabilities based on HMRC gross taxable income, and pro-rata figures applied for 11 days of November 2021 and 25 days of April 2022.