

Ombudsman's Determination

Applicant	Ms R
Schemes	Smart Pension National Employment Savings Trust (NEST)
Respondent	Jigsaw Earlsdon Ltd (the Nursery)

Outcome

1. Ms R's complaint is upheld and to put matters right the Nursery shall pay any missing contributions in respect of her pension and make good any loss of investment returns. In addition, the Nursery shall pay a distress and inconvenience award to Ms R for the serious distress and inconvenience that she has suffered.

Complaint summary

2. Ms R has complained that the Nursery has failed to pass on all the contributions due to Smart Pension and NEST and to comply with its auto enrolment obligations.

Background information, including submissions from the parties

3. In April 2019, Ms R was informed by her employer that the company, Early Years Learning Academy (**EYLA**), would be rebranded and restructured as Jigsaw Nursery. The letter stated that contributions in respect of the scheme with Smart Pension would be brought up to date before the restructure.
4. The following month, Ms R received a similar notification. The Nursery said that it would be enrolling Ms R into a new pension scheme with effect from 1 May 2019.
5. The payment schedule in place for the Nursery's new scheme, set up with NEST, required the Nursery to make a payment, in respect of each monthly pay period, by the 10th day of the following month.
6. The available evidence indicates that the Nursery reached its auto enrolment staging date in June 2019. The evidence also suggests that NEST is used by the Nursery to fulfil its auto enrolment obligations under the Pensions Act 2008.
7. In July 2019, the Nursery acknowledged that Ms R may have received incorrect information concerning the Smart Pension scheme. The Nursery clarified that

contributions in respect of EYLA were still outstanding and owed to her pension by the Nursery, as her “previous (EYLA) employer.”

8. The Nursery stated that payments would be brought up to date, as it had advised in “numerous” correspondence. The Nursery said it did not anticipate that the contributions would be delayed much longer.
9. In August 2019, the Nursery notified Ms R that her outstanding contributions, as confirmed by Smart Pension, amounted to £550.06. The Nursery indicated that it had reached an agreement with Smart Pension to pay this in monthly instalments over three consecutive months (the **Agreement**). The Nursery advised that Ms R’s contributions would be paid to NEST going forward.
10. Under the terms of the Agreement, the first instalment was due to be paid to Smart Pension on 12 August 2019.
11. In October 2019, Ms R’s employment with the Nursery was terminated on the grounds of redundancy.
12. On 21 February 2020, a Petition to wind up Early Years Learning Academy/Jigsaw [Earlsdon Ltd] was presented by Coventry City Council, an alleged creditor of the company. The Company House website shows that compulsory strike-off action against the Nursery has been discontinued.
13. Ms R has explained that the Nursery was formerly known as Early Years Learning Ltd. It is now known as Jigsaw Earlsdon Ltd, following successive changes in company name. Although the name has changed, the same individual is still the director of both companies. In January 2019, Ms R noticed that the Nursery was not paying across pension contributions to the Smart Pension scheme. However, it was still deducting them from her salary. Also, employer contributions were not being remitted to the pension scheme. In July 2019, the Nursery advised her of further delays. However, it failed to commit to any timescales to pay the contributions. Ms R claims that several of her former colleagues are in a similar position.
14. Ms R maintains that the Nursery deducted contributions from her salary in respect of the period from November 2018 to December 2019 but failed to pay them all to the respective pension scheme. The Nursery also failed to pay the required employer contributions. Ms R also states that the contributions covering pay periods June 2019 to August 2019, were not paid until October 2019. On 2 August 2020, contributions amounting to £115.84 were shown as “pending” from the Nursery in her NEST account.
15. Ms R claims that the Nursery made “unrealistic promises of money” in writing to her. She alleges it has since used “delaying tactics” because it does not have available funds to pay the missing contributions.
16. Ms R says that despite her numerous requests, the Nursery failed to provide her with all her payslips to verify the amount of employee contributions that were deducted.

The Nursery also failed to provide details of the employer contributions due each month.

17. Ms R has advised that she is bringing tribunal proceedings in respect of outstanding salary payments. Ms R was allegedly made redundant after she raised formal grievances against the Nursery.
18. Ms R submitted a spreadsheet, (the **Spreadsheet**), as part of her evidence to my Office. This provides a breakdown of the contributions she claims were still outstanding as of 2 August 2020.
19. The Spreadsheet shows outstanding employee contributions amounting to £333.34 and employer contributions of £216.72 due to Smart Pension.
20. The Spreadsheet indicates that employee contributions of £294.40 and employer contributions of £198.60 are due to NEST.
21. My Office requested a formal response to Ms R's complaint on four separate occasions. The Nursery has failed to provide this.
22. On 4 August 2020, the Nursery requested details of the outstanding contributions so that it could consider how to resolve the issue.
23. A copy of the Spreadsheet was shared with the Nursery. The Nursery was asked to provide documentary evidence to support its position if it disagreed with Ms R's calculations. The Nursery was also asked to confirm whether it accepted the Adjudicator's recommendations on how to put the matter right. The Nursery did not respond.
24. In general terms, the Pensions Act 1995 (the **Act**), requires a money purchase scheme to have a payment schedule in place. The schedule must show the rates of contributions payable and the "due dates." Under Section 87(2) of the Act, the employer must pay contributions by the due dates in the payment schedule. Where trustees have reasonable cause to believe that a failure to pay on or before the payment due date is likely to be of material significance in the exercise of their functions, the Act requires that the trustees notify the Pensions Regulator (**TPR**) and the members of the payment failure.
25. On 24 August 2020, NEST notified Ms R that it had reported the Nursery to TPR (the **Notification**). NEST explained that the Nursery had not paid contributions on time or had failed to notify NEST that contributions were not due to be paid.
26. NEST indicated that employer contributions of £49.65 and employee contributions of £66.19 were due to be paid across on 24 March 2020 but were outstanding at the date of the Notification.
27. The Nursery has said that any action that was taken in respect of the winding up of the company has been placed on hold due to the current coronavirus situation in the UK.

28. Ms R says she suspects that some of the companies controlled by the directors of the Nursery may be in financial difficulty. She would like her complaint determined so that she can be included in the list of creditors in the event that the Nursery becomes insolvent.

Adjudicator's Opinion

29. Ms R's complaint was considered by one of our Adjudicators who concluded that there had been maladministration on the part of the Nursery. The Adjudicator's findings are summarised below:-

- The Adjudicator considered that it is necessary to form a view on what is more likely to have occurred, as the evidence is limited.
- The Adjudicator noted that the Nursery has not disputed Ms R's calculation of the missing contributions.
- The Adjudicator also considered that the Nursery has been given ample opportunity to put forward its position and to review the Spreadsheet.
- The Adjudicator recommended that the Nursery should make good the shortfall in pension contributions, amounting to £1,043.06, that Ms R is claiming. The Nursery should also review its records and pay across any further missing contributions to the relevant scheme.
- The Adjudicator noted that Mr Y's complaint (CAS-40993-J9L4), which I recently Determined, raised similar issues. In line with the directions made in that case, the Nursery should ask Smart Pension and NEST to calculate Ms R's investment loss.
- The Adjudicator further recommended that the Nursery should pay a distress and inconvenience award of £500.

30. The Nursery did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. I agree with the Adjudicator's Opinion except in respect of the distress and inconvenience award, I note that no additional points have been raised by the Nursery.

Ombudsman's decision

31. I acknowledge that Ms R has raised a new issue concerning a payment that was allegedly made to NEST on 30 July 2020 and subsequently reversed by the Nursery. This Determination only deals with the original complaint accepted for investigation. I am not considering any matters that fall outside the scope of that complaint.

32. The available evidence supports the view that employee contributions were being deducted but held back by the Nursery and not paid into the pension arrangement.

33. I am mindful that Ms R was given information that indicated that action was being taken to correct the position and is likely have accepted that information in good faith. The Nursery's failure to pay the contributions across to the appropriate pension scheme amounts to unjust enrichment. Ms R is entitled to redress to remedy any financial loss she has suffered.
34. Ms R is also entitled to a distress and inconvenience award in respect of the serious on-going non-financial injustice the Nursery has caused her to suffer which was made worse by its failure to properly respond to our investigation into Ms R's complaint.
35. I uphold Ms R's complaint.

Directions

36. Within 21 days of the date of this Determination, the Nursery shall:
 - I. pay Ms R £1,000 in respect of the serious distress and inconvenience she has suffered;
 - II. pay the unpaid contributions of £550.06 to Smart Pension and the contributions of £493 to NEST;
 - III. request that Smart Pension and NEST calculate any loss of investment gains from the due date of each contribution to the date of actual payment, on the assumption the contributions were invested in Ms R's chosen investment fund(s);
 - IV. pay any reasonable administration fee should Smart Pension and/or NEST charge a fee for carrying out the above calculations; and
 - V. within 21 days of receiving confirmation from Smart Pension and NEST of any loss of investment gains, pay to Smart Pension and NEST the amount(s) required to remedy that loss.

Anthony Arter

Pensions Ombudsman
23 October 2020