

Ombudsman's Determination

Applicant	Mr S
Scheme	National Employment Savings Trust (NEST)
Respondents	NEST Corporation Panisade Ltd

Outcome

1. The complaint made by Mr S is upheld against Panisade Ltd. Panisade Ltd shall refund the contributions it deducted from his salary with interest calculated using the base rate for the time being quoted by the Bank of England.

Complaint summary

2. Mr S has complained that:-
 - Panisade Ltd provided NEST Corporation with an incorrect date of birth and National Insurance number when automatically enrolling him into NEST in November 2018. As a consequence of this mistake, NEST Corporation held incorrect personal details for him.
 - NEST Corporation failed to comply with his request to opt out of NEST within the one month opt out period. It also refused to refund the contributions that were deducted from his salary by Panisade Ltd and paid into NEST against his wishes.
 - He has suffered considerable distress and inconvenience dealing with this matter.

Background information, including submissions from the parties

3. According to the records held by NEST Corporation, Mr S was automatically enrolled into NEST by: (a) Bleep 360 Ltd on 14 December 2017, 20 August 2018, and 21 September 2018, and (b) Fosse Recruitment on 18 December 2017.
4. Mr S successfully opted out of NEST on each of these four occasions.
5. Bleep 360 Ltd provided NEST Corporation with an incorrect date of birth for Mr S. However, he was able to guess this date and use it during the opt out process.

6. On 16 November 2018, Panisade Ltd automatically enrolled Mr S into NEST. It provided NEST Corporation with an incorrect date of birth and National Insurance number.
7. NEST Corporation sent Mr S a member welcome pack which said that:

“Your employer Panisade enrolled you into NEST with effect from 16 November 2018 and your active membership with us starts three working days later...”
8. On 21 November 2018, Mr S contacted NEST Corporation to find out why he had been automatically enrolled into NEST, and give notice that he wanted to opt out again. NEST Corporation said it was unable to answer his specific queries or carry out his opt out request. It explained that this was because he could not provide the personal details, which his employer had supplied for him. When asked for his employer’s name, Mr S replied that it was Bleep 360 Ltd.
9. Mr S gave NEST Corporation his correct date of birth and National Insurance number. He asked it to amend its records accordingly. NEST Corporation said it could not do so because of data protection issues. It also said that Mr S should ask his employer to provide correct personal details for him, and it could then carry out his opt out instructions.
10. On 21 November 2018, Mr S made a complaint because he was dissatisfied with the service he had received from NEST Corporation.
11. On 2 December 2018, Mr S notified NEST Corporation that he had received a letter from HM Revenue and Customs (**HMRC**) which said that Panisade Ltd had automatically enrolled him into NEST. He also said that Bleep 360 Ltd had provided incorrect personal details for him. He advised that he was in full time NHS employment: Panisade Ltd was not his “main employer for HMRC records.”
12. During a telephone call with Mr S on 10 December 2018, NEST Corporation again asked Mr S to contact his employer so that it could supply correct information for him.
13. In an e-mail dated 10 December 2018 to NEST Corporation and Bleep 360 Ltd, Mr S reiterated that he wanted to opt out of NEST. He said he was unhappy that NEST Corporation had refused to accept the personal details he had provided. Furthermore, it had failed to carry out his opt out request. He also said that he was “not interested” in asking his employer to provide the correct details because he had already given them directly to NEST Corporation.
14. Mr S asked Bleep 360 Ltd and Panisade Ltd to work with NEST Corporation to put matters right.
15. On 16 December 2018, Mr S sent a further e-mail to NEST Corporation and Bleep 360 Ltd. He said that:

“Thank you Medical 360 for your...letter about the law and pensions dated 12/12/18.

However you failed to mention how you will get me out of this pension you've placed me in for the 4th time in 12 months now, having always had the wrong date of birth for me and now it seems the wrong National Insurance number...

Can you explain how your enrolment of myself to NEST...is legal with giving them false information [SIC]? Your letter didn't explain this...

Bleep 360 please explain why I was enrolled...4 times in 12 months. Yes it may be a legal requirement but I've not moved from the company once never mind 4 times...”

16. On 17 December 2018, Mr S sent an e-mail to Bleep 360 Ltd. He requested details of the incorrect personal data it had provided to NEST Corporation so that he could use it to opt out of NEST.
17. Mr S did not receive a reply by 20 December 2018, the date on which his opt out period ended.
18. In a letter dated 20 December 2018, NEST Corporation provided Mr S with details of the incorrect information Panisade Ltd had provided for him.
19. On 28 December 2018, Mr S notified “Fosse Panisade” that NEST Corporation had informed him he could no longer opt out of NEST. He said that it was only after the opt out period had elapsed that he was informed that Panisade Ltd had provided incorrect personal details for him.
20. Mr S received an e-mail on the same day from Fosse Healthcare Ltd which said that:

“Obviously due to GDPR we cannot speak to NEST about your money that you are owed back from them but as this is a legal requirement for you to have pension contributions, legally they must refund you if you opt out.

Mr S will need to claim the refund from NEST.”
21. In January 2019, Mr S made a complaint under NEST's internal dispute resolution procedures (**IDRP**).
22. On 22 July 2019, Panisade Ltd informed NEST Corporation that no further contributions would be payable into NEST in respect of Mr S.
23. NEST Corporation subsequently notified Mr S that the annual statement for his “Panisade work” was available for him to view. NEST Corporation also informed Mr S that it had reported Panisade Ltd to the Pensions Regulator.
24. The value of Mr S' contributions in NEST on 16 August 2019 was £13.90.
25. In August 2019, NEST Corporation issued its response under stage one of the IDRP but did not uphold the complaint.

26. In September 2019, after receiving the stage one IDRPs decision letter, Mr S made a claim for death benefits online in an attempt to obtain a refund of his contributions.
27. On 8 October 2019, NEST Corporation notified Mr S' family of his death and requested details of his next of kin. On 19 October 2019, Mr S informed NEST Corporation that he was still alive and wished to continue with his complaint.
28. Mr S subsequently complained under stage two of the IDRPs. In January 2020, NEST Corporation issued a response and upheld the stage one decision.

Mr S' position

29. NEST Corporation accepted at face value the date of birth and National Insurance number supplied by Panisade Ltd without verifying the details with him.
30. NEST Corporation prevented him from successfully opting out of NEST by failing to obtain correct personal details for him from Panisade Ltd.
31. NEST Corporation only drew to his attention that it was Panisade Ltd, and not Bleep 360 Ltd, who had supplied the wrong data after the opt out period had elapsed. If it had notified him in good time, he would have sent the e-mail he sent on 10 December 2018 to Panisade Ltd. Furthermore, he would not have sent the e-mail dated 16 December 2018 to Bleep 360 Ltd.
32. NEST Corporation should have provided him with the incorrect date of birth and National Insurance number before the opt out period ended on 20 December 2018.
33. NEST Corporation has contravened data protection principles by holding incorrect personal information on its records.
34. NEST Corporation relied heavily on "automated processes designed to maximise their income revenue with disregard for the customers who want to leave." Its staff was "unhelpful" when dealing with his opt out request.
35. NEST Corporation should have checked with a reputable source before sending a distressing letter to his family which stated that he had died.
36. NEST Corporation should refund the contributions that Panisade Ltd paid into NEST against his wishes. In addition, it should pay a substantial award for the considerable distress and inconvenience it caused him and his family.

NEST Corporation's position

37. Its opt out process has been designed to be compliant with The Occupational and Personal Pension Schemes (Automatic Enrolment) Regulations 2010 (**the 2010 Regulations**). The 2010 Regulations state that an opt out notice is valid if "it includes the jobholder's National Insurance number or date of birth".

38. While the 2010 Regulations only requires Mr S to provide his National Insurance number or date of birth to opt out, NEST Corporation requires both details as evidence of his identity for its internal security checks.
39. It does not independently verify the personal data supplied by an employer for the purpose of automatically enrolling workers into NEST. The onus is on the employer to provide the correct details.
40. If the information is incorrect, a member can ask his/her employer to rectify the mistake within six weeks of the date it was submitted. Alternatively, a member can provide documentary evidence of his/her identity so that NEST Corporation can amend their date of birth on its records. Its telephone operators can also update a member's National Insurance number after the member has passed its security checks.
41. It has apologised to Mr S for not providing him with details of the incorrect National Insurance number it held on its records. It has also apologised to Mr S for not offering to update its records during the telephone call on 10 December 2018. However, at that time it still required Mr S to contact his employer so that it could update his date of birth. NEST Corporation could then carry out his request to opt out of NEST.
42. It accepts that holding incorrect personal details for Mr S infringed the data protection regulations. However, in accordance with its processes, it needed to verify his identity before it could amend the erroneous information supplied by Panisade Ltd.
43. During a telephone call on 22 August 2019, it updated Mr S' National Insurance number and reiterated that he needed to provide evidence of his identity before it could amend his date of birth.
44. During its investigation at stage two of the IDRPs, it "deviated" from its usual process and updated his date of birth, without requiring evidence of his identity. This was to ensure that the record it held for him was correct.
45. It cannot use the data supplied for Mr S, during his previous enrolments into NEST, to verify the information that Panisade Ltd provided to NEST Corporation. The details were removed from its records when he opted out, to comply with data protection regulations.
46. It is sympathetic towards Mr S' unfortunate situation. However, once his statutory opt out notice period ended on 20 December 2018, it could no longer permit him to opt out of NEST. By allowing him to do so would be "breaking the law."
47. Consequently, Mr S' contributions to NEST cannot be returned to him and will be used to provide him with benefits on his retirement. Mr S can transfer his pension rights in NEST to another pension scheme if he wishes.
48. It commenced its death claim process in line with its normal procedures because it had no reason to suspect that a "fraudulent claim" had been made. It does not use a third-party source to verify a member's death.

49. Bleep 360 Ltd has said that:-

- It is a separate entity to Panisade Ltd and Fosse Recruitment and has no relationship with them.
- It originally offered Mr S a fixed term contract and he met the eligibility criteria for automatic enrolment into a pension scheme. When this contract ended, he was offered a new one a few months later. To comply with its legal duties, it reassessed Mr S's eligibility and enrolled him into NEST again.
- It automatically enrolled Mr S into NEST on 21 September 2018 by mistake after he had opted out a month earlier.

50. Fosse Recruitment has explained that Panisade Ltd is an "umbrella" company that employs its contractors. However, it is a separate legal entity.

51. The welcome pack which it sent Mr S clearly showed that it was Panisade Ltd that automatically enrolled Mr S into NEST on 16 November 2018. It has apologised to Mr S for not pointing this out to him during the telephone conversation on 21 November 2018.

52. Panisade Ltd did not submit a formal response to The Pensions Ombudsman.

Adjudicator's Opinion

53. Mr S' complaint was considered by one of our Adjudicators who concluded that further action was required by Panisade Ltd. The Adjudicator's findings are summarised in paragraphs 54 to 73 below.

54. Automatic enrolment was introduced in 2012 and requires employers to automatically enrol eligible jobholders into a pension scheme. The Pensions Act 2008 and subsequent regulations set out the detailed requirements.

55. The employer needs to assess new workers and monitor existing workers on an ongoing basis in order to automatically enrol those who become eligible jobholders.

56. The employer must also provide the scheme administrator with specific "jobholder information" and specified "enrolment information" must be provided by the employer to the jobholder no later than six weeks after the automatic enrolment date.

57. Broadly, the same information requirements apply on re-enrolment.

58. An employee who has been automatically enrolled or re-enrolled can subsequently opt out by giving notice within a one-month period and any member contributions must be returned to the member. The opt out period starts from the later of the following dates for an automatic enrolment pension scheme:

- the date the jobholder is given the enrolment information; and

- the date on which the employer made arrangements for the jobholder to become an active member.
59. For individuals who are auto-enrolled, contributions must be deducted in accordance with section 49 of the Pensions Act 2008.
 60. It is clear from the evidence that Panisade Ltd was responsible for enrolling Mr S into NEST on 16 November 2018. The member welcome pack, and the HMRC letter which Mr S subsequently received, confirmed this.
 61. There was no requirement for NEST Corporation to independently verify the personal data supplied by an employer for the purpose of automatically enrolling its workers into NEST. It was the employer's responsibility to ensure that it provided the correct information to NEST Corporation and to rectify any mistakes.
 62. Panisade Ltd supplied NEST Corporation with an erroneous date of birth and National Insurance number for Mr S during the automatic enrolment process. In the Adjudicator's view, this constituted maladministration on the part of Panisade Ltd and was the root cause of the unfortunate position Mr S now found himself in. Furthermore, when Mr S brought this to Panisade Ltd's attention on 28 December 2018, it should have provided NEST Corporation with his correct details. In the Adjudicator's opinion, its failure to do so represented further maladministration.
 63. NEST Corporation was entitled to exercise its own commercial judgment when deciding what its internal processes and practices should be when conducting business. It was not for the Pensions Ombudsman (**PO**) to impose his procedures on pension providers.
 64. In order for the opt out request Mr S made on 21 November 2018 to be valid, NEST Corporation required Mr S to pass a security check so that it could verify his identity. As Panisade Ltd had provided an incorrect date of birth, and National Insurance number, Mr S failed the security check.
 65. Mr S gave NEST Corporation his correct date of birth and National Insurance number and asked it to amend its records. However, as he had not passed its security check, NEST Corporation could not be sure that it was Mr S who was making the request and quite rightly did not comply. In any event, to amend his date of birth, its procedures also required Mr S to have provided evidence of his identity. Mr S did not provide this.
 66. Mr S could have asked his employer to rectify the mistakes made in the data. NEST Corporation informed him on 21 November and 10 December 2018 that this option was available to him.
 67. The Adjudicator was satisfied that the member welcome pack and the HMRC letter, which Mr S received, made it sufficiently clear that Panisade Ltd had enrolled him into

NEST. It was unfortunate that Mr S continued to believe that Bleep 360 Ltd had enrolled him.

68. Mr S should have sent his e-mails dated 10 and 17 December 2018 to Panisade Ltd. If he had done so, it would have had the opportunity to either rectify the data or provide him with details of what it had submitted so that he could use it in the opt out process. In the Adjudicator's opinion, there would have been sufficient time for NEST Corporation to comply with Mr S' opt out request.
69. However, when Mr S belatedly contacted "Fosse Panisade" on 28 December 2018, his opt out notice period had already lapsed, and he had lost the opportunity to opt out of NEST.
70. The legislation surrounding automatic enrolment, and the opt out process, is prescriptive. NEST Corporation must comply with this legislation and could not accept an opt out request from Mr S made outside the notice period under any circumstances. Consequently, there was no maladministration on the part of NEST Corporation for not: (a) allowing him to opt out of NEST, and (b) refunding his contributions. It could not do so because the relevant legislation did not allow this.
71. The letter that NEST Corporation sent to Mr S' family on 8 October 2019, would undoubtedly have caused distress. However, it was sent after Mr S had made a claim for death benefits. NEST had no reason to suspect the claim was invalid.
72. As NEST Corporation acted in accordance with its procedures after receiving the claim, in the Adjudicator's view, its actions did not amount to maladministration.
73. Mr S' complaint that NEST Corporation had infringed data protection principles did not fall within the jurisdiction of the PO and was a matter for the Information Commissioner.
74. In the Adjudicator's view, any distress and inconvenience which Mr S had suffered was partially attributable to his own actions. Consequently, it did not merit the PO's minimum award of £500. However, Panisade Ltd should refund Mr S the contributions which it deducted from his salary with interest. The interest should be calculated using the base rate for the time being quoted by the Bank of England.
75. Mr S did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr S provided his further comments which do not change the outcome.
76. Mr S said that:-
 - The remedy recommended by the Adjudicator is inadequate.
 - NEST Corporation should acknowledge the considerable upset it caused him by informing his father that he had died: it should reimburse all the contributions he paid into NEST while working for agencies in the healthcare sector. His contributions amount to approximately £200.

77. I note the additional points raised by Mr S, but I agree with the Adjudicator's Opinion.

Ombudsman's decision

78. Having examined all the available evidence carefully, I find that there was no maladministration on the part of NEST Corporation for not allowing Mr S to opt out of NEST and receive a refund of his contributions. Similarly, for sending the letter dated 8 October 2019 to his family. My reasons for reaching this conclusion are essentially the same as those given by the Adjudicator in his Opinion.
79. I agree with the Adjudicator that the unfortunate circumstances, Mr S now finds himself in, were chiefly caused by the failure of Panisade Ltd to provide NEST Corporation with his correct date of birth and National Insurance number during the automatic enrolment process. I find that this failure constitutes maladministration on the part of Panisade Ltd.
80. When Mr S brought this issue to the attention of Panisade Ltd on 28 December 2018, it should have promptly notified NEST Corporation of his correct personal details. I consider its failure to do so represents further maladministration.
81. Mr S says that NEST Corporation should pay him compensation for the considerable distress which it caused him and his family by sending the letter dated 8 October 2019.
82. NEST Corporation, however, only sent this letter after Mr S had made an online death claim. Any upset caused by this letter was regrettably a consequence of his own actions.
83. When deciding whether to direct an award for distress and inconvenience, I assess each case based on its facts and merits. My awards for non-financial injustice are modest and not intended to punish a respondent.
84. Given my conclusions above, I find that any distress and inconvenience which Mr S had suffered that is not attributable to his own actions, is insufficient to merit my minimum award of £500.
85. I uphold Mr S' complaint against Panisade Ltd only and make an appropriate direction below.

Directions

86. Within 28 days of the date of this Determination, Panisade Ltd shall refund the contributions it deducted from Mr S' salary. The contributions shall be paid with interest calculated using the base rate for the time being quoted by the Bank of England.

Anthony Arter
Pensions Ombudsman
05 August 2022