

Ombudsman's Determination

Applicant	Mrs L, Miss Y and Miss T (the Applicants)
Scheme	NEST Pension Scheme (the Scheme)
Respondent	Vicknarasa Kugathanan (trading as 5 Star Food & Wine Ltd) (the Respondent)

Outcome

1. The Applicants' complaints are upheld and to put matters right, the Respondent shall pay pension contributions into the Scheme, on the Applicants' behalf, for the period from (a) 8 April 2015 to (b) the date he started paying pension contributions to the Scheme, on their behalf, in November 2017.
2. The Respondent will ascertain from Nest what if any is the investment return in respect of the missing contributions and pay such return into the Scheme.
3. The Respondent will also pay each of the Applicants an award for the extreme distress and inconvenience that he has caused.

Complaint summary

4. The Applicants' complaints concern the Respondent's failure to pay pension contributions, on their behalf, into a pension scheme when their employment was transferred in April 2015.

Background information, including submissions from the parties

5. Originally, the Applicants were employed by the Co-Operative Group (**the Co-Op**). In January 2013, they joined the Co-Op Pension Scheme (**PACE**) and were initially required to pay contributions of 1% of their salary (with the Co-Op paying 2%, making the total contribution 3%). From 1 October 2017, the contribution rates were due to rise to 2% (employee) and 3% (employer) respectively.
6. On 24 February 2015, the Applicants were informed in writing that their store had been bought by the Respondent. On 7 April 2015, the Applicants were sent a further letter by the Co-op which said:

“Both the Co-operative Group and Mr Vicknarasa Kugathanan acknowledge that this constitutes a TUPE transfer. This means that you will transfer on your current terms and conditions of employment with your Co-Operative Group continuous service carried forward.

If you are a member of the Co-Operative Group Pension scheme, you will also be eligible for protection under the new Transfer of Employment (Pension Protection) Regulations 2005, whereby the buyer must provide a scheme with a matching contribution of up to 6% of actual gross pay.”

7. On 8 April 2015, the Applicant's employment with the Respondent commenced but the Respondent failed to provide them with a pension provision at the time. In March 2018, they complained to him about his failure to provide them with pension provision between 8 April 2015 and November 2017.
8. In their submissions, the Applicants made the following points:-
 - Between 8 April 2015 and November 2017, the Respondent did not provide them with a pension arrangement. However, since November 2017 he had been deducting pension contributions from their salary but had not always invested the deductions so The Pensions Regulator (**TPR**) was looking into this.
 - This situation had caused them stress and was still not resolved, so they asked the Ombudsman to resolve it.
9. The Respondent did not provide a response to the complaints although he had a number of opportunities to do so.

Adjudicator's Opinion

10. The Applicants' complaints were considered by one of our Adjudicators who concluded that further action was required by the Respondent. The Adjudicator's findings are summarised below:-
11. The transfer of the Applicants' employment from the Co-Op to the Respondent is covered by The Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI2006/246) (**TUPE 2006**). It is also subject to the Pensions Act 2004, and the Transfer of Employment (Pension Protection) Regulations 2005 (SI2005/649) (as amended) (**the Pension Protection Regulations**). Extracts from the relevant legislations are provided in the Appendix.
12. Under section 257 of the Pensions Act 2004 and the Pension Protection Regulations, since 6 April 2005 transferee employers are obliged to provide pension benefits for transferring employees where all the following conditions are satisfied:-
 - There is a TUPE transfer.

- By virtue of the transfer, the employee ceases to be employed by the transferor and becomes employed by the transferee.
 - Immediately before the transfer, there is an occupational pension scheme in relation to which the transferor is the employer and the employee is:-
 - an active member of the scheme; or
 - eligible to be such a member; or
 - in a probationary period to become eligible to be a member.
13. In these circumstances, if any of the benefits that may be provided under the transferor's scheme are money purchase benefits, the transferring employee qualifies for protection only if the transferor was required to make employer contributions or, if there was no such requirement, at least one such contribution was actually made by the former employer.
14. Where an employee qualifies for protection, it becomes a term of his contract with the new employer that he will be offered access to a money purchase scheme which meets the prescribed standard.
15. The Applicants were active members of PACE prior to the TUPE transfer to the Respondent. They paid contributions of 1% and the Co-op paid 2%. Following the TUPE transfer, the Respondent was obliged to provide an occupational pension scheme which the Applicants could join from the date their employment transferred, that is, 8 April 2015. He was also obliged to pay contributions which matched those paid by the Co-Op to PACE. This amounted to 2% of the Applicants' earnings from April 2015 to September 2017, and 3% of their earnings from October 2017 to September 2018.
16. The Respondent's failure to establish an appropriate pension arrangement for the Applicants or to pay the required contributions amounted to maladministration. In the Adjudicator's opinion, the Applicants had suffered injustice because they were not provided with the required pension accrual for that period.
17. It was also the Adjudicator's view that the Respondent's failure to respond to the Applicants' complaints, and his failure to respond to our request for a response to the complaints, would have caused the Applicants serious distress and inconvenience. Therefore, they should all receive an award in recognition this.
18. Consequently, it was the Adjudicator's view that the Applicants' complaints should be upheld.
19. The Applicants accepted the Adjudicator's Opinion but the Respondent did not respond and the Applicants have confirmed that he has not been co-operative with them, on this matter. Therefore, the complaint was passed to me to consider.

Ombudsman's decision

20. It is clear that the Respondent did not fulfil his legal duty when he failed to establish an appropriate pension arrangement for the Applicants or to pay the required contributions between 8 April 2015 and November 2017. This is despite the Applicants' request and an Adjudicator advising that he should do so. His failure to fulfil his legal duty amounts to maladministration.
21. The Respondent has had numerous opportunities to correct his error but has failed to do so and has shown a complete disregard of his responsibilities and legal requirements. He has also not engaged with my Office or the Applicants.
22. The Respondent's failure to acknowledge my Adjudicator's requests for a response to the complaints, and also his refusal to engage with the Applicants, would have caused the Applicants further distress and inconvenience. So, I have taken this into consideration in increasing my award for the distress and inconvenience the Applicants have suffered.
23. I will notify TPR of the Respondent's failure to comply with the pensions legislation.
24. I uphold the Applicants' complaints.

Directions

25. Within 21 days of the date of this Determination, the Respondent shall:
 - pay into the Scheme, 2% of the Applicants' earnings for the period 8 April 2015 to 30 September 2017; and
 - pay into the Scheme, 3% of the Applicants' earnings for the period 1 October 2017 to the date he started making pension contributions into the Scheme, on the Applicants' behalf, in November 2017.
26. Within 14 days of the date of this Determination, the Respondent shall:
 - ascertain from Nest the investment return, if any, in respect of the missing contributions;
 - within 7 days of receipt of the information from Nest, should there be any investment return in respect of the missing pension contributions, pay such monies into the Scheme;

PO-21305

- pay the Applicants £2,000 each, for the extreme distress and inconvenience they have experienced as a result of his failure to comply with his obligations under the Pensions Act 2004, the Pension Protection Regulations and our investigation.

Anthony Arter

Pensions Ombudsman
20 March 2020

Appendix

The Pensions Act 2004

“Pension protection on transfer of employment

257 Conditions for pension protection

- (1) This section applies in relation to a person (“the employee”) where -
 - (a) there is a relevant transfer within the meaning of the TUPE regulations,
 - (b) by virtue of the transfer the employee ceases to be employed by the transferor and becomes employed by the transferee, and
 - (c) at the time immediately before the employee becomes employed by the transferee -
 - (i) there is an occupational pension scheme (“the scheme”) in relation to which the transferor is the employer, and
 - (ii) one of subsections (2), (3) and (4) applies.
- (2) This subsection applies where -
 - (a) the employee is an active member of the scheme, and
 - (b) if any of the benefits that may be provided under the scheme are money purchase benefits -
 - (i) the transferor is required to make contributions to the scheme in respect of the employee, or
 - (ii) the transferor is not so required but has made one or more such contributions.

...

- (5) For the purposes of this section, the condition in subsection (1)(c) is to be regarded as satisfied in any case where it would have been satisfied but for any action taken by the transferor by reason of the transfer.

- (8) In this section -

the “TUPE Regulations” means the Transfer of Undertakings (Protection of Employment) Regulations 2006 ...”

“258 Form of protection

- (1) In a case where section 257 applies, it is a condition of the employee's contract of employment with the transferee that the requirements in subsection (2) or the requirement in subsection (3) are complied with.
- (2) The requirements in this subsection are that -
 - (a) the transferee secures that, as from the relevant time, the employee is, or is eligible to be, an active member of an occupational pension scheme in relation to which the transferee is the employer, and
 - (b) in a case where the scheme is a money purchase scheme, as from the relevant time -
 - (i) the transferee makes relevant contributions to the scheme in respect of the employee, or
 - (ii) if the employee is not an active member of the scheme but is eligible to be such a member, the transferee would be required to make such contributions if the employee were an active member, and
 - (c) ...
- (3) The requirement in this subsection is that, as from the relevant time, the transferee makes relevant contributions to a stakeholder pension scheme of which the employee is a member.
- (4) The requirement in subsection (3) is for the purposes of this section to be regarded as complied with by the transferee during any period in relation to which the condition in subsection (5) is satisfied.
- (5) The condition in this subsection is that the transferee has offered to make relevant contributions to a stakeholder pension scheme of which the employee is eligible to be a member (and the transferee has not withdrawn the offer).
- (6) Subsection (1) does not apply in relation to a contract if or to the extent that the employee and the transferee so agree at any time after the time when the employee becomes employed by the transferee.
- (7) In this section—

“the relevant time” means -

- (a) in a case where section 257 applies by virtue of the application of subsection (2) or (3) of that section, the time when the employee becomes employed by the transferee;
- (b) ...

“relevant contributions” means such contributions in respect of such period or periods as may be prescribed;

“stakeholder pension scheme” means a pension scheme which is registered under section 2 of the Welfare Reform and Pensions Act 1999 (c. 30).”

The Transfer of Employment (Pension Protection) Regulations 2005 (SI2005/649) (as amended)

As at the date the Applicants' employment transferred, Regulation 3 provided:

- “(2) This paragraph is satisfied if the amount contributed by the transferee in respect of each remuneration period is -
 - (a) where the employee's contributions are less than 6 per cent. of the employee's remuneration, an amount not less than the contributions made by the employee;
 - (b) where the employee's contributions equal or exceed 6 per cent. of the employee's remuneration, an amount not less than 6 per cent. of that remuneration.
- (3) This paragraph is satisfied if -
 - (a) in respect of the remuneration period immediately before the relevant time -
 - (i) the transferor had been required to make contributions; and
 - (ii) those contributions had been solely for the purpose of producing money purchase benefits for the employee; and
 - (b) the amount contributed by the transferee is not less than the amount the transferor had been required to contribute.”