

## Ombudsman's Determination

Applicant	Krueger Ltd (the <b>Company</b> )
Scheme	National Employment Savings Trust (the <b>Scheme</b> )
Respondent	NEST Corporation ( <b>NEST</b> )

## Outcome

1. I do not uphold the Company's complaint and no further action is required by NEST.

## Complaint summary

2. The Company complains that:
  - NEST incorrectly reported a payment failure to the Pensions Regulator (the **Regulator**).
  - NEST notified the Company's employees that the contributions were overdue and refused to resolve the issue.

## Background information, including submissions from the parties

3. The Scheme is a money purchase pension arrangement. It is used by the Company to comply with its auto enrolment requirements under the Pensions Act 2008.
4. 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".
5. Part 43 of the Regulator's code of practice no. 5: "Reporting late payment of contributions to occupational pension schemes" (**Code 5**), states that trustees should make enquiries regarding the cause and circumstances of the suspected payment failure.
6. 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 Regulator and the members of the failure. The notification must be issued within a "reasonable period" after the due

date, except in prescribed circumstances. The requirement is referenced in part 42 of Code 5 (**Part 42**).

7. The Regulator's code of practice 01: "Reporting breaches of the law" (**Code 1**), states:

**"The decision to report** [original emphasis]

30. There are two key judgments required:-

- First, does the reporter have reasonable cause to believe there has been a breach of the law?
- If so, then, secondly, does the reporter believe the breach is likely to be of material significance to the Pensions Regulator?"

8. Code 1 explains that "reasonable cause" means more than merely having a suspicion that cannot be substantiated. Where the "reporter" does not know the facts or events surrounding the suspected breach, it will usually be appropriate to check with the party who is able to confirm the position.
9. On 5 April 2017, NEST alerted the Company that one or more contribution schedules was overdue (the **Notification**). The Notification stated that this could be the result of NEST not receiving the payment NEST was expecting in respect of some or all of the Company's workers.
10. The Notification warned that NEST was legally required to report the Company to the Regulator. It advised that the Company needed to take immediate action in respect of eight workers. The Notification stated:
- "It's very important you clear all overdue schedules as soon as possible. For guidance on how to manage overdue schedules visit [www.nestpensions.org.uk/helpcentre/overdue-contribution-schedules](http://www.nestpensions.org.uk/helpcentre/overdue-contribution-schedules)."
11. NEST advised that it would notify the Company if it made a report to the Regulator. NEST stated that it would also immediately inform the affected workers that it had made the report.
12. On 6 April 2017, the Company's representative (the **Representative**), contacted NEST. He advised that the Company had made a payment of £3,478 (the **Single Contribution**). He said that this appeared to be the payment for the year. He asked how the amount could be reconciled?
13. On 10 April 2017, NEST confirmed receipt of the payment of £3,478 on 13 January 2017. NEST advised that the schedule in respect of the period 31 December 2016 to 30 January 2017, was now paid.
14. NEST explained that contribution schedules can only be corrected once paid. NEST advised the Representative to select "Paid schedules" and then the relevant schedule to be corrected. NEST included a link to further guidance on "contribution correction"

published on its website. NEST advised that the difference in the contributions would be refunded, less disinvestment charges.

15. NEST stated that there was an unpaid schedule on the account in respect of the period 31 January 2017 to 28 February 2017 (the **Schedule**). It advised that the Company had not uploaded information for its workers in the Schedule.
16. The email explained that NEST's system automatically issues a late payment notification if NEST does not receive payment by the due date. NEST advised that the Company would need to submit a schedule each time contributions become payable. NEST stated that it could enter "zero contributions" for the Company's workers if no contributions were due. NEST signposted the Representative to additional information on its website on how to enter zero contributions.
17. The Representative replied on 11 April 2017. He advised:
 

"We sent a reply to you last week about this. The whole year's payment was done in advance in one payment. How can we resolve this?"
18. The Representative reiterated that the full payment of £3,478 had been made on 11 January 2017. A member by member breakdown of those contributions is provided below:

Member	Earnings	Employer contributions	Member contributions	Total contributions
1	£12,000.40	£120	£96	£216
2	£6,652.80	£66.53	£53.22	£119.75
3	£31,999.79	£320	£256	£576
4	£29,377.40	£293.77	£235.02	£528.79
5	£37,176	£371.16	£297.41	£669.17
6	£29,377.40	£293.77	£235.02	£528.79
7	£16,640	£166.40	£133.12	£299.52
8	£30,000.36	£300	£240	£540
Total contributions paid				£3,478.02

19. On 12 April 2017, NEST repeated the guidance it had provided on 10 April 2017 (the **Guidance**). NEST made clear that if it did not receive the contributions by the due date they would be classed as a late payment, unless the Company "included a valid reason code for partial or non-payment".

20. The Company submitted a schedule in respect of March 2017 that same day. It incorrectly indicated that no further contributions were payable. Consequently, the Company was required to re-enrol its workers into the Scheme.
21. There were further exchanges between NEST and the Representative concerning the Schedule in the intervening period. During those interactions, the Representative clarified that the contributions due for the year had been included in the schedule for the period ending 30 January 2017.
22. The Representative has advised that the Company did not issue any communications to the members as the Representative and the Company considered that the contributions were up to date.
23. NEST reissued the Guidance on six separate occasions before notifying the Company's employees in early July 2017 that it had reported the Company to the Regulator (the **Notice**). Around the same time, NEST made a payment failure report to the Regulator (the **Report**),
24. The Notice stated that NEST had issued several reminders to the Company concerning the alleged failure to either pay contributions on time, or notify that contributions were not due. It stated that this breached the Company's legal duty as an employer.
25. The Notice showed outstanding "unknown" contributions in respect of the period 31 January 2017 to 28 February 2017. It recommended that the workers talk to the Company to prevent a recurrence.
26. The Representative subsequently complained to NEST. NEST provided its response under stage one of its internal dispute resolution procedure (**IDRP**) on 26 September 2017. NEST acknowledged that the Representative had concerns about using the option of "insufficient earnings" as a reason for non-payment. However, it did not uphold the complaint.
27. NEST stated that under the agreement in place, regular payments were due on a monthly basis by the 10th of the month. By making a bulk payment at the start of the year, schedules would need to be submitted "as a zero payment each period as workers would need to remain as active throughout their enrolment."
28. NEST maintained that it was the employer's responsibility to ensure that schedules were submitted when due. NEST had provided guidance on how to resolve the issue. The Schedule remained unpaid, without a valid reason for non-payment. NEST acknowledged that the Representative had confirmed in various exchanges that payment was not due. NEST stated that the Schedule needed to be submitted to support this.
29. NEST advised the Company to use the "insufficient earnings" option if contributions were not due for any of the workers.

30. The Representative wrote to NEST on 10 November 2017 concerning its alleged maladministration of the Scheme. He complained that it had incorrectly notified the Regulator that the Company had failed to make contributions. He asked NEST to make a distress and inconvenience award of £500 to each member, and a further award of £1,000 to the Company. He requested that NEST cover £2,000 in additional costs incurred by his company.
31. The Representative acknowledged issues with the way his company had processed the Single Contribution via NEST's system. However, he said that NEST had been repeatedly advised that the contributions were made as one payment and were up to date for all employees. He highlighted that NEST had a schedule of earnings for the affected employees. Consequently, NEST was aware of the position concerning the contributions. He complained that NEST had refused to inform the Regulator that the Report was incorrect and to resolve the issue.
32. The Representative claimed that NEST had made a further administrative error by failing to provide a contribution history despite his repeated requests. He noted that the Scheme was now closed. As a result, a new scheme would need to be set up which would cause further costs to the Company and inconvenience to both the Company and its employees.
33. In January 2018, NEST acknowledged an enquiry from the Representative received on 1 October 2017. NEST noted that it was a request for a breakdown of the paid contributions and for a history of the transactions on the account. NEST explained that its messaging team had replied at the time and had advised that the information would be added to the complaint. NEST noted that the Representative had since made further requests for the same information and for the Scheme rules (the **Rules**).
34. NEST apologised for the delay in providing the information. NEST included details of the contributions and a separate transaction history. It also provided a link to the Rules.
35. On 8 June 2018, the IDRPs second stage decision-maker replied to the Representative concerning the Report and NEST's alleged mismanagement of the complaint process (the **Final Decision**). She identified service failings on the part of NEST. She also acknowledged issues with NEST's handling of the complaint throughout, including delays in escalating the matter for a second stage decision.
36. Regarding the Schedule, the decision-maker acknowledged that the Representative had been wrongly advised on separate occasions to close the Schedule using the "insufficient earnings" option. She explained that he should have been directed to correct the Schedule, particularly as he had informed NEST that an earlier schedule had been submitted incorrectly. She confirmed that steps had been taken to ensure that the correct advice is provided in future.
37. The decision-maker accepted that the Representative's request for a contribution history had been missed. She apologised for the mistakes that had been made by NEST. However, she did not uphold the specifics of the Representative's complaint.

She maintained that although there had been service issues, NEST had acted lawfully.

38. The decision-maker explained that as the Scheme was used by several employers, a report is automatically sent to the Regulator if contributions are outstanding for more than 90 days. She stated that NEST is unable to modify the report on a case-by-case basis.

39. The Company's position is summarised below:-

- Kruger Ltd is a small business. The Company and its employees have been subject to maladministration. The Company has been illegally and incorrectly reported to the Regulator for an alleged breach that did not occur.
- "A large company such as NEST should not be allowed to walk roughshod over a small business such as this and should have put things right when given the opportunity to do so."
- The Notice caused distress to the employees and the Company's directors who were aware that the issue was caused by NEST's maladministration.
- "The impact was certainly significant for each and every individual concerned and possibly serious for the directors of the business and in particular the scheme administrator [(**Administrator**)] who is a director and a member."
- The effect on the Administrator, "could have been considered as severe as it wrongly brought into question her reputation, efficiency and ability."
- There was no legal duty on NEST to make the Report. A report should only be made to the Regulator if contributions have not been submitted within 90 days of the due date. Therefore, NEST failed to follow the law.
- At the point NEST made the Report, the Company had paid more than the amount required. NEST should not have written to the employees as the Company had funded the employee contributions in advance.
- The Report was made because of an administrative issue on the part of NEST. NEST should notify the Regulator that the contributions are not overdue and have never been outstanding.
- NEST incorrectly referred to the stage one decision as the stage two response on two separate occasions. The final stage of the dispute process was not in fact completed until 8 June 2018.
- The Final Decision was incomplete and incorrect. It failed to address the number of complaints raised. It acknowledged errors and maladministration on the part of

NEST. However, it did not recognise that the employees, the employer and its advisers had been subject to “material distress and inconvenience”.

- NEST did not respond to all the queries that were raised and failed to reply within reasonable timescales on numerous occasions.
- NEST was given the opportunity to resolve the problem at no cost to NEST. The Company’s advisers had to spend a significant amount of time working on the case.

40. NEST’s position is summarised below:-

- NEST has a duty to ensure that employers are meeting their obligations. Any contributions outstanding for more than 90 days will be notified to the Regulator.
- Under Part 42, NEST is legally required to make a report to the Regulator and inform members within a “reasonable period”. By notifying the employees, NEST made them aware that the Company had not taken the correct action.
- The Company stated that any contributions due were paid in the previous month’s schedule. However, it acted incorrectly by paying the contributions a year in advance.
- Employers are bound by NEST’s terms and conditions(**T&C**). These state that the employer must make payments to the Trustee in line with the agreed payment schedule. The T&C require contributions to be made via monthly schedules.
- It is the employer’s responsibility to correct a schedule if it has not been submitted with the correct contributions. NEST is unable to make changes to an employer’s account as NEST has “read-only access”.
- Between 11 April 2017 and 20 October 2018, NEST provided the same information on how to correct and update payment schedules on nine separate occasions. NEST also provided further information on 15 May 2019.
- It seems unlikely that the annual contribution amount included in the schedule for the period ending 30 January 2017 is correct. The salaries could have changed. Any one of the workers could have left service during the year. Furthermore, the payment is a relatively small sum given that the Company enrolled [eight] workers into the Scheme.
- While there were issues with the service NEST provided to the Company, they do not amount to maladministration.

41. Unable to reach a resolution with NEST, a director of the Company submitted a complaint to this office. The director confirmed that the complaint was on behalf of the Company.

42. The Representative subsequently advised this office that once the case has been concluded, the Company will provide authority from its employees to pursue the matter on their behalf, as appropriate.

### **Adjudicator's Opinion**

43. The complaint was considered by one of our Adjudicators who concluded that no further action was required by NEST. The Adjudicator's findings are summarised below:-

- In cases such as this, it is unlikely that the Ombudsman would consider it appropriate for an employer to act in a representative capacity for its employees. There would be a potential conflict of interests between the employer and its employees.
- In any event, the employees would need to show that they have genuinely suffered non-financial injustice as a result of serious errors made by NEST.
- Even if the Ombudsman was to review a complaint brought by the Company's employees about the same subject matter, he or she would likely consider an award of £500 to each employee to be disproportionate given the amount of their individual pension contributions.
- Timely communication to the affected employees, explaining that the contributions had been paid in advance, and outlining the action the Company would be taking to resolve the matter, would likely have helped alleviate any concerns the employees may have had at the time.
- The view of this office is that a corporate entity cannot suffer distress. An Ombudsman could make an inconvenience award to a company where the injustice warrants at least £500.
- While NEST confirmed that it had received the payment of £3,478, it also clarified why the Company was receiving late payment notifications. Namely, that there was an overdue payment schedule in respect of which the Company had not loaded contributions paid or payable.
- The Adjudicator was satisfied that NEST had explained the action required to correct the issue. While the Company had experienced service issues with NEST, the Adjudicator was not persuaded that an Ombudsman would consider these to be sufficiently significant to justify a finding of maladministration in the circumstances.
- Code 5 explains that it is for trustees to decide what process to put in place to identify whether contributions that fall due under the payment schedule are paid in



full and on time, provided it is suitable for the purpose of identifying “payment failures”.

- Code 1 is clear that it is for the “reporter” to reach a decision on whether to report a breach of the law to the Regulator. In all cases, the Regulator expects reporters to act conscientiously and honestly.
- Ultimately, it was for NEST to reach a judgment on “material significance”. It was then a matter for the Regulator whether to regard the alleged breach as a significant breach.

44. The Company did not accept the Adjudicator’s opinion and the complaint was passed to me to consider. The Representative has provided further comments, but these do not change the outcome. I agree with the Adjudicator’s opinion and I will therefore only respond to the points made by the Representative for completeness.
45. The Representative has clarified that they do not dispute that NEST explained the remedial action required. Their dispute is that NEST failed to apply the law correctly and indicated to employees that the Company was at fault in the matter. This could have damaged the reputation of the Company’s directors.
46. The Representative contends that the Adjudicator completely overlooked the fact that there had been no “material payment failures” at the time NEST made the Report. Even after 90 days of the due date, no payment failure had occurred. He therefore questions the legal basis for NEST making the Report.
47. The Representative says that it is clear NEST did not have suitable processes in place to identify payment failures in accordance with Code 5. This indicates a fundamental breach of the code. The Adjudicator should have immediately brought this to the attention of the Regulator.
48. The Representative highlights that a key judgment in Code 1 “is reasonable cause to believe that there has been a breach of the law.” In his view, the evidence is clear that NEST was aware from its records that a breach had not occurred. He does not question that NEST acted honestly to the extent that its system automatically followed a precise sequence. However, it does not follow that NEST acted conscientiously. NEST failed to stop what would appear to be an automatic report. It therefore either acted negligently or did not have suitable systems and controls in place.
49. The Representative states that this case concerns a fundamental breach of disclosure and the failure of NEST to have adequate systems and controls in place. It also concerns a small firm and its employees that have been subject to this. NEST misled the Regulator, the affected employees, the Company and its directors.
50. The Representative states that the Pensions Ombudsman’s latest guidance on non-financial injustice does not indicate that the contributions in respect of each employee should be taken into account. In his view, employees of small companies would suffer significant distress if they considered that their employer was in financial difficulty.

The directors would at the very least experience serious distress because of the impact on the employees. The Administrator would have suffered severe distress given the negative effect on her reputation in the workplace.

51. The Representative contends that the complaint should be extended to include all the relevant parties, as it was also brought on behalf of the individual directors and the employees.

## **Ombudsman's decision**

52. Apart from any potential conflict of interest, there is nothing to corroborate that the Company was appointed to act for its employees in this matter. I therefore do not comment or make any findings concerning the alleged non-financial injustice caused to the employees by NEST.
53. The issue for me to consider is whether, in notifying the Regulator and the affected employees of a suspected payment failure, NEST made a serious administrative error.
54. The Regulator's codes of practice are intended to provide "practical guidelines on the requirements of pensions legislation". Pensions law does not impose any statutory duties on pension trustees to comply with the codes. Nevertheless, any alternative approach adopted by trustees must meet the underlying legal obligations.
55. I note that the Company erroneously included contributions in respect of period ending 28 February 2017 in a payment that it had made in January 2017. I acknowledge that the Representative notified NEST of the position on 6 April 2017. I accept that the Representative confirmed in his subsequent exchanges with NEST that the contributions had been made annually in advance.
56. Under Section 87(2) of the Act, the employer must pay contributions by the due dates in the payment schedule in place for the scheme. I am not aware that the Act explicitly precludes employers from making payments in advance.
57. That said, the Guidance was issued to the Company on more than one occasion. I have no reason to suspect that it was incorrect. I note that the Representative does not dispute that NEST explained the action required to resolve the issue.
58. Given the size of the Scheme, I do not think it is unreasonable for NEST to have an automatic notification system in place to warn the Regulator and members of a suspected payment breach in circumstances such as these.
59. The evidence tends to support the view that the Company did not correctly carry out the instructions provided in the Guidance. The evidence also indicates that the Schedule was still outstanding at the time the Notice was issued and the possible payment failure reported to the Regulator.

60. Under the terms of the contract the Company is required to make monthly payments to NEST using an agreed monthly payment schedule, not make payment one year in advance which it is quite likely will need adjusting during the year. The Company was told this on numerous occasions and also that it could enter 'a zero payment' code on the monthly schedule if the monies had already been paid to NEST. The Company did not comply with its contractual terms. NEST cannot be expected to set up a special arrangement for each customer outside of its standard contract. Also, to safeguard members NEST has automatic systems in place to notify the Regulator if it does not receive the monthly payment schedules showing the rates of contributions payable and the due date.
61. I accept that NEST has partly contributed to what has gone wrong. NEST has acknowledged that it misinformed the Representative on more than one occasion that the "insufficient earnings" reason code could be used in respect of the Schedule. The Company should have been able to rely on NEST for clear and consistent guidance on how to clear the outstanding schedule.
62. NEST repeatedly failed to provide a history of the contributions. I note that NEST also mismanaged the complaint process.
63. Where there is compelling evidence that inconvenience has been caused to a corporate body sufficiently serious to justify an award for non-financial injustice, I would normally direct that the respondent remedy that injustice. It is evident that there have been instances of serious service failings on the part of NEST. However, I am not persuaded that an award is justified in the circumstances.
64. The Company's main dispute is that NEST sent the Notice to its employees and the Report to the Regulator. The matter could have been resolved had the Company corrected the Schedule in good time. This may have prevented this matter from escalating to the extent that it has.
65. I do not uphold the complaint.

**Anthony Arter**

Pensions Ombudsman  
28 November 2019

## Appendix

### Pensions Act 1995:

*“Receipts, payments and records*

49 Other responsibilities of trustees, employers, etc

Where—

(a) on making a payment of any earnings in respect of any employment there is deducted any amount corresponding to any contribution payable on behalf of an active member of an occupational pension scheme, and

(b) the amount deducted is not, within a prescribed period, paid to the trustees or managers of the scheme and there is no reasonable excuse for the failure to do so,

the employer is guilty of an offence and liable, on summary conviction, to a fine not exceeding the statutory maximum and, on conviction on indictment, to imprisonment, or a fine, or both.”

...

### **“Schedules of payments to money purchase schemes: supplementary**

(1) Except in prescribed circumstances, the trustees or managers of an occupational pension scheme to which section 87 applies must, where any amounts payable in accordance with the payment schedule have not been paid on or before the due date, give notice of that fact, within the prescribed period, to the Authority and to the members of the scheme.

(2) Any such amounts which for the time being remain unpaid after that date (whether payable by the employer or not) shall, if not a debt due from the employer to the trustees or managers apart from this subsection, be treated as such a debt.

(3) Where any amounts payable in accordance with the payment schedule by or on behalf of the employer have not been paid on or before the due date, section 10 applies to the employer.

(4) If, in the case of an occupational pension scheme to which section 87 applies, subsection (1) is not complied with—

(a) section 3 applies to any trustee who has failed to take all such steps as are reasonable to secure compliance, and

(b) section 10 applies to any trustee or manager who has failed to take all such steps.”

## **Code of practice no. 5: Reporting late payment of contributions to occupational pension schemes**

### **“Part three - Reporting material payment failures**

#### **Reporting material payment failures to the regulator**

42. Trustees must report a material payment failure to the regulator and members within a reasonable period. A material payment failure is where:

- contribution payments and other amounts under the payment schedule are not paid to the scheme by the due date(s), and
- there is ‘reasonable cause to believe’ that this failure is likely to be of material significance to the regulator in the exercise of its functions.

43. Having ‘reasonable cause to believe’ means more than an unsubstantiated suspicion. Trustees should make enquiries and use their judgement when deciding whether to report to the regulator. While they are not expected to undertake a full investigation to establish materiality or investigate whether an employer has committed fraudulent behaviour, the trustees should seek to enquire of the employer:

- the cause and circumstances of the payment failure
- what action has been taken by the employer as a result of the payment failure, and
- the wider implications or impact of the payment failure, for example on member benefits.”

...

#### **“Reasonable period for reporting to the regulator**

48. A reasonable period for reporting to the regulator will be within ten working days of the trustees having reasonable cause to believe that a material payment failure exists. For example, the regulator should receive a report within ten working days of the trustees having received verbal or written confirmation from an employer that they do not intend to pay.

49. Exceptionally, where there is a current or imminent danger to members’ and/or the employer’s payments unless immediate preventative action is taken, trustees should report the failure to the regulator by telephone as soon as they become aware of the occurrence. The trustees should confirm telephone reports in writing, for example by letter or email, as soon as reasonably practicable and in any event within ten working days.

#### **Reasonable period for reporting to members**

50. Once the trustees have reasonable cause to believe that a material payment failure exists they should report to members within 30 days of having reported to the regulator.

51. The regulator believes that members should be made aware of outstanding payments and have the opportunity to discuss these with their employer at an early opportunity, as this may assist in the resolution and recovery of overdue payments. For this reason, trustees should consider reporting to the affected members around the same time as their initial contacts with the employer to pursue outstanding payments. If the trustees have already notified the member at an earlier point in their contacts with the employer they may choose whether to notify the member again at the point of reporting to the regulator.

**Method of reporting to the regulator**

52. Reports should be made in writing (preferably electronically) except where a telephone report is made in the exceptional circumstances set out in paragraph 49 above.

53. The regulator has standardised reporting for material payment failures in terms of content, format and channel and trustees should refer to separate guidance for more details including the data standards which trustees should comply with.”