

Ombudsman's Determination

Applicant	Ms O
Scheme	NEST (the Scheme)
Respondent	SGW Lab Limited, formerly Segawa (the Employer)

Outcome

1. I do not uphold Ms O's complaint and no further action is required by the Employer.

Complaint summary

2. Ms O has complained that the Employer:
 - failed to automatically enrol her into the Scheme when she commenced employment; and
 - was late in enrolling her and paying her contributions into the Scheme.

Background information, including submissions from the parties

3. The Pensions Act 2008 stipulated that all employers must enrol certain workers into a pension scheme (**automatic enrolment**). Between 1 October 2012 and 1 April 2017, all employers in existence on 1 April 2012 had to begin their automatic enrolment duties. For new employers, set up between April 2012 and March 2013, their automatic enrolment duties started on 1 May 2017. For new employers, set up between April 2013 and September 2017, their automatic enrolment duties started between 1 July 2017 and 1 February 2018. New employers from October 2017 had immediate automatic enrolment duties.
4. In accordance with part one of the Pensions Act 2008, employers are responsible for establishing whether or not they need to provide a pension scheme and what their duties are. Employers who are required to provide a pension scheme must:-
 - Set up a pension scheme (ideally before their duties start).

- Automatically enrol eligible staff¹ into a pension scheme from their first day of employment and deduct pension contributions from their pay².
 - Inform staff how automatic enrolment applies to them, within six weeks of the employer duties start date.
 - Declare their compliance to the Pensions Regulator (**TPR**) within five months of their duties start date.
5. On 20 January 2018, Ms O joined the Employer and asked to be automatically enrolled into a workplace pension scheme because she met the automatic enrolment criteria. The Employer was not able to automatically enrol Ms O because it had not set up a scheme at that point. The Employer did not inform Ms O of her automatic enrolment rights within six weeks of her start date.
 6. Ms O has said that she received amended contracts of employment on 1 May 2018 and 26 July 2018. She has also said that she continued to ask the Employer about automatic enrolment and each time the Employer said that it was “looking into it.”
 7. In June or July 2018, the Employer set up the Scheme.
 8. On 27 July 2018, the Employer automatically enrolled Ms O into the Scheme and began deducting employee contributions from her pay from this date. Ms O has said that the Employer told her that:-
 - TPR had said the Employer’s duties started on 27 July 2018.
 - The Pensions Advisory Service (**TPAS**) said it only had to pay contributions from this date.
 9. On 31 August 2018, Ms O left the Employer.
 10. In October 2018, Ms O asked the Employer to backdate its contributions to 20 January 2018, when she had commenced employment, rather than 27 July 2018. Ms O has said that the Employer refused her request based on what it claimed was advice from TPAS.
 11. In April 2019, the Employer confirmed that it had paid backdated employer and employee contributions in respect of Ms O’s service from January to March 2018, then employer only contributions from April to June 2018. Ms O asked for the Employer to also pay the employee contributions for April to June 2018, but she was informed that the employee contributions were her responsibility.

¹ Members of staff who are: aged between 22 and State Pension Age; earning more than £833 a month; working in the UK and; have a contract of employment.

² Contributions must be deducted in line with the Pensions Act 2008 section 49. All contributions deducted during the first three months of membership must reach the scheme by 22nd of the fourth month, where paid electronically (or by the 19th if paid by another means).

12. On 16 August 2019, the Scheme administrator, NEST, wrote to Ms O and explained that she was “slightly better off” as a result of the late payment of contributions.
13. In October 2019, Ms O asked the Employer to pay her an award for the distress and inconvenience that she had suffered as a result of her pension contributions being paid into the Scheme late. She said:-
 - She should have been enrolled in the Scheme when she commenced employment in January 2018.
 - It took six months for the Employer to enrol her into the Scheme.
 - She had spent considerable time and effort trying to get the correct contributions paid to the Scheme.
 - She had not been treated fairly.
14. The Employer declined Ms O’s request and said:-
 - It had agreed to, and paid, the backdated contributions as soon as it reasonably could have.
 - Ms O was its first employee so it “misunderstood” its automatic enrolment duties.
 - It would not pay Ms O compensation because there was no “legal basis.”
15. Ms O remained dissatisfied because:-
 - She believed that the Employer treated her unfairly and should have resolved the situation much quicker.
 - She had to approach TPAS, TPR and The Pensions Ombudsman’s Office (**TPO’s Office**) about the issue.
 - The distress had caused her to leave the Employer.
 - She had found it “fairly common for Japanese employers in the UK to pay as little as they possibly can, often ignoring legal requirements.”

Adjudicator’s Opinion

16. Ms O’s complaint was considered by one of our Adjudicators who concluded that no further action was required by the Employer. The Adjudicator’s findings are summarised below:-
 - The Employer’s failure to enrol Ms O in the Scheme when she began employment amounted to maladministration.
 - The Employer could have paid the contributions into the Scheme sooner than it did, but it had paid Ms O’s share of the contributions between January and March

2018, and NEST had confirmed that Ms O had not suffered any financial loss as a result of the late payment of contributions.

- It was not reasonable for Ms O to leave the Employer because she was not automatically enrolled into the Scheme. Furthermore, Ms O had raised other issues that were likely to have contributed to her decision to leave.
- Ms O had suffered some distress and inconvenience, which is classed as non-financial injustice, but it did not warrant the Pensions Ombudsman's minimum monetary award.

17. Ms O did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Ms O provided her further comments which do not change the outcome. Ms O said:-

- She had to spend a significant amount of time getting the contributions paid to the Scheme.
- She should receive "at least" £500 for the distress and inconvenience that she had suffered.
- The Employer should offer her a formal apology.

18. The Adjudicator informed Ms O that she could make up the missing employee contributions, but Ms O maintained that the Employer should pay these contributions to the Scheme.

19. I note the additional points raised by Ms O, but I agree with the Adjudicator's Opinion.

Ombudsman's decision

20. Ms O has complained that the Employer failed to comply with its automatic enrolment duties on time and was late in paying her contributions to the Scheme.

21. The Employer has accepted this failure and attributed this to a misunderstanding of how automatic enrolment worked, which is not uncommon for new employers.

22. It is clear that the Employer should have had a scheme set up for auto-enrolment purposes when Ms O started and as such she should have been automatically enrolled in January 2018. However, as there was no scheme set up Ms O was not enrolled until July 2018 when the Scheme was established. Although the Employer initially said it was only required to make contributions from July 2018 it subsequently paid contributions backdated to January 2018, in April 2019.

23. These errors clearly constitute maladministration on the part of the Employer. I have considered whether Ms O has suffered any injustice as a result of the Employer's actions, or lack of, and whether she is in the position she would have been in had the errors not occurred.

24. In this case, the normal course of action would be for the Employer to pay the contributions that it should have made, had Ms O been automatically enrolled correctly, and offer Ms O the opportunity to pay any missing employee contributions. The Employer has confirmed that in April 2019 it paid backdated payments into the Scheme. The Employer covered both employer and employee contributions for January to March 2018 by paying contributions equal to two per cent of Ms O's salary. The Employer also covered its own contributions for the period April to June 2018 by making a payment equal to one per cent of Ms O's salary. The two per cent contributions covered both employer and employee contributions between January and March 2018, which is above the level the Employer was obliged to make.
25. This leaves employee contributions not paid for the period April to June 2018. To remedy this Ms O has been informed that she could pay these direct to NEST . However, Ms O has declined to do so.
26. NEST has also sent Ms O written confirmation that she is in a better position than she would have been in, had the contributions been paid on time. Given that the Employer has paid three months of employee contributions and Ms O has been offered the opportunity to pay the outstanding employee contributions, I do not believe that Ms O has suffered a financial loss. I am also satisfied that she is in a very similar position to the one she would have been had the errors not occurred and I do not think it is reasonable for Ms O to expect the Employer to make good the missing employee contributions.
27. Ms O says she had to contact TPAS, TPR and my Office for further information and that she left the Employer because of its failures, both of which caused her significant distress and inconvenience. I do not agree that contacting TPAS, TPR and my Office will have caused Ms O significant distress and inconvenience to warrant the minimum compensatory award of £500.
28. Ms O says she left employment because of the automatic enrolment issues she had experienced. But this does not appear to be the sole or primary reason she left the Employer. During the investigation Ms O has implied there were other issues she had with the Employer..
29. I consider that the Employer has taken sufficient steps to remedy the situation before the matter was passed to me and while it might have been prudent for the Employer to apologise for its failures, I am satisfied that the situation has been appropriately resolved.
30. I do not uphold Ms O's complaint.

CAS-13464-R4T8

Anthony Arter

Pensions Ombudsman
22 January 2021