

Ombudsman's Determination

Applicant	Mr S
Scheme	National Employment Savings Trust (the Scheme)
Respondent	NEST Corporation (NEST)

Outcome

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

Complaint summary

2. Mr S has complained that:-
 - NEST failed to act on his request to opt him out of the Scheme and have not refunded the contributions deducted by his employer;
 - He is dissatisfied with the manner in which NEST handled his complaint; and
 - NEST failed to remove his personal details from its records as he requested.

Background information, including submissions from the parties

3. Mr S commenced employment on 3 August 2018, which made him eligible for automatic enrolment (**auto-enrolment**) into the Scheme. The same day, the employer enrolled Mr S into the Scheme and NEST issued him its "welcome pack" by post. The welcome pack stated:

"Your employer...enrolled you into [the Scheme] with effect from 03 August 2018 and your active membership with us starts three working days later."
4. Under the section "Opting out of [the Scheme]" it stated:

"You can opt out of saving for your retirement with [the Scheme] if you'd like to...If you opt out, any money you've contributed with this employer will be refunded, but you should think carefully before making this decision. If you still want to opt out you must do this between 08 August 2018 and 07 September

2018. You can't opt out of [the Scheme] outside of this period but you can take a break from contributing at any time."

5. On 6 August 2018, Mr S called NEST and asked to opt out of the Scheme. He was informed that he could not opt out until the opt out window had started as he was not yet an "active member" and was not appearing on its systems yet. NEST asked Mr S to call back or make his opt out request during the opt out window on or after 8 August but before 7 September 2018 (**the opt out period**).
6. Mr S was unhappy with this and asked to be opted out immediately. He also asked for his details to be removed from NEST's systems stating that he wanted to exercise his "right to erasure" under the General Data Protection Regulation (**GDPR**). NEST informed him that the right to erasure did not apply but that it would raise the request and a response would be provided within the regulatory time frame of one month. It restated that in order to opt out he would need to call back on or after 8 August 2018 but before 7 September 2018 in order for his opt out to be processed. During this call Mr S confirmed that he had not yet received the welcome pack from NEST.
7. NEST sent a response to the right to erasure request on 30 August 2018. This explained that NEST was unable to remove Mr S' personal details as they were necessary for it to comply with its legislative requirements in administering a pension scheme. NEST acknowledged that this was not the response Mr S was hoping for and provided details should he wish to escalate this complaint.
8. Mr S called NEST a number of times on 18 September 2018, following his receipt of its response to his right to erasure request on 17 September 2018. During these calls Mr S raised a formal complaint under the Scheme's internal dispute resolution procedure (**IDRP**). Mr S complained about the service he had received, that his request to opt out in the call on 6 August 2018 was not actioned and that his right to erasure request had not resulted in his personal details being removed. During these calls he also asked for his contributions to be ceased. NEST informed him that the request would be completed more promptly if he actioned it himself via the online account.
9. On 19 September 2018, Mr S again requested that his contributions into the Scheme be ceased. This request was actioned the same day. However, further contributions were deducted from Mr S' pay after this date to cover the period up to 19 September 2018.
10. Following receipt of NEST's response under IDRP stage one on 16 October 2018, Mr S appealed to stage two of the IDRP on 29 October 2018. Mr S was dissatisfied with the response under IDRP stage one and did not feel that his three complaints had been adequately addressed.
11. NEST's response to Mr S' stage two IDRP appeal was issued on 1 February 2019. In summary, in IDRP stage one and two, NEST explained the relevant auto-enrolment legislation and the employer's obligations to enrol jobholders who meet the minimum criteria. The complaint was not upheld on the basis that Mr S did not make a valid opt

out request, as it was not made within the opt out period of 8 August to 7 September 2018. NEST said it was explained in the call of 6 August 2018, that Mr S would need to opt out on or after 8 August 2018, but no opt out request was received from him before the opt out period ended. It noted that it had responded to his right to erasure request on 30 August 2018, but that the grounds upon which an individual can request their personal data to be erased, set out under Article 17 of the GDPR, do not apply in this case and also explained its need to retain his personal data. NEST acknowledged that while the information given in the calls on 18 September 2018, was correct, the call handlers could have provided a better service. It also acknowledged that the IDRP stage one response was below the level it expects to provide and it addressed his other complaints about the level of service he had received.

Adjudicator's Opinion

12. Mr S' complaint was considered by one of our Adjudicators who concluded that no further action was required by NEST. The Adjudicator's findings are set out below:-

- Mr S was unhappy that his opt out request to NEST, made on 6 August 2018, was not actioned. However, Mr S' request was made before the opt out period began which meant the request was not valid. As no valid request was received within the opt out period, NEST was unable to process a refund of Mr S' contributions.
- The Occupational and Personal Pension Schemes (Automatic Enrolment) Regulations 2010 (**the 2010 Regulations**), sets out the law in relation to auto-enrolment, including the period over which the opt out period will run. Regulation 9(2) states:

“Where the jobholder has become an active member of an occupational pension scheme, the jobholder must give their employer a valid opt out notice within a period of one month beginning with the later of—

(a) the date on which the jobholder became an active member of the scheme in accordance with regulation 6(1)(a), or

(b) the date on which the jobholder was given the enrolment information.”

- Regulation 6(1) states:

“The arrangements the employer must make in accordance with section 3(2) (automatic enrolment) of the Act are to enter into arrangements with—

(a) the trustees or managers of an automatic enrolment scheme which is an occupational pension scheme, so that before the end of a period of six weeks beginning with the automatic enrolment date the jobholder

to whom section 3 of the Act applies becomes an active member of that scheme with effect from the automatic enrolment date”.

- Regulation 9(4) states:

“Subject to paragraph (5), the jobholder may only obtain an opt out notice from the scheme in which the jobholder is an active member.”

- Regulation 9(4) sets out that a member can only opt out once they have achieved active membership of a scheme. So, while active membership is effective from the auto-enrolment date, Regulation 6(1)(a) allows a six-week window known as the “joining window” in which active membership must be achieved. In accordance with the Pensions Regulator’s **(TPR)** “Detailed guidance for employers Automatic enrolment”¹, it is for the employer to make arrangements with NEST to create active membership under the Scheme Rules within the six-week joining window.
- The Scheme Rules give the Trustee the power to determine the timing of a member achieving active membership. The Trustee has determined that active membership (in relation to a new member) is achieved 3 days after the members admission to membership. NEST explained that it has done this to allow time for the member to receive its welcome pack to ensure that they have been able to make an informed decision in accordance with the guidance issued by TPR.
- The Adjudicator considered that NEST had made no errors in setting the opt out period to start on 8 August 2018 and end on 7 September 2018. The 2010 Regulations made it clear that an opt out request cannot be made before or after the opt out period.
- The Adjudicator listened to the telephone call made on 6 August 2018, and while Mr S made clear that he wanted to opt out, NEST explained a number of times that he would need to do so on or after 8 August 2018, when his opt out period started. The welcome pack issued to Mr S on 3 August 2018, also clearly stated the dates between which he could opt out and while Mr S confirmed in the telephone call that he had not yet received it, NEST did clearly inform him of the relevant dates. Mr S did not request to opt out within the opt out period, so no valid opt out request was made.
- As no valid opt out request was made, Mr S is not entitled to a refund of his contributions. The 2010 Regulations make clear that refunds can only be paid where an opt out request is made within the opt out period. In addition, as the Scheme Rules do not allow for a refund of contributions outside of the opt out period, Mr S has become a deferred member.
- NEST must administer the Scheme in line with the Scheme Rules and any overriding legislation, so NEST was unable to provide Mr S with a refund of his

¹ <https://www.thepensionsregulator.gov.uk/-/media/thepensionsregulator/files/import/pdf/detailed-guidance-5.ashx>

contributions and there was no maladministration in NEST not doing so. Returning the contributions now would be classed as an unauthorised payment by HMRC and would attract a tax charge for both the Scheme and Mr S.

- Mr S was also dissatisfied with the manner in which NEST had dealt with his requests and his complaint. NEST acknowledged that the level of service it provided at certain times had been below the level it expected to provide and has apologised for this. The Adjudicator agreed that this would have caused Mr S some distress and inconvenience but did not consider it warranted the minimum award for non-financial injustice as set out in my published guidance². In the Adjudicator's view, NEST's apology had adequately addressed this point and so this aspect of the complaint was not upheld.
- Mr S is also not happy that NEST was retaining his personal data. NEST has said that it is unable to remove all of Mr S' personal data as it is required to retain it to meet its obligations under legislation. NEST has provided Mr S with its privacy policy and removed the data that it is not required to keep. As this complaint is about the retention of data under the GDPR it does not fall within my jurisdiction and would be more appropriately directed to the Information Commissioner's Office (**the ICO**). So, the Adjudicator could not uphold this aspect of the complaint and noted that Mr S was already in communication with the ICO.

13. Mr S did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr S provided his further comments and said:-

- Even though NEST admitted fault it did not uphold the complaint and neither did the Adjudicator.
- He no longer had the paperwork as The Pensions Ombudsman's Office had not shown an interest in his complaint and did not support him in resolving the matter.
- He wanted his complaint reviewed and if it was proven that NEST had acted in error, he would like his money back with interest and an award in recognition of NEST having not carried out what it should have done.

14. I agree with the Adjudicator's Opinion and note the additional points raised by Mr S.

Ombudsman's decision

15. Mr S requested to be opted out of the Scheme on 6 August 2018. He is unhappy that this was not actioned, and pension contributions were then deducted from his salary until he ceased contributing in September 2018. He is also unhappy that these contributions cannot now be refunded.

² <https://www.pensions-ombudsman.org.uk/wp-content/uploads/Updated-Non-financial-injustice-September-2018-2.pdf>

16. NEST has explained the reason that it could not action Mr S' opt out request on 6 August 2018, was because this was before the opt out period had begun on 8 August 2018. As no request was received during the opt out period of 8 August to 7 September 2018, no valid opt out request can be said to have been made and NEST cannot now refund Mr S his pension contributions.
17. Although, Mr S asked to be opted out when he contacted NEST on 6 August 2018, NEST has no discretion to change or extend the opt out period. It explained to Mr S during the telephone call on 6 August 2018, that he needed to make his opt out request during the opt out period. This was clearly stated to Mr S on more than one occasion during this conversation. I consider that it is Mr S' omission in not making a valid opt out request during the opt out period that has resulted in him now being a deferred member of the Scheme as opposed to this being due to maladministration on the part of NEST. Mr S did not mitigate his circumstances by contacting NEST again during the opt out period as he had been advised. NEST acted within the 2010 Regulations by not opting Mr S out of the Scheme on his verbal request made on 6 August 2018.
18. Mr S believes he made a valid request to opt out and wants a refund of his contributions, but NEST cannot return the contributions, as the 2010 Regulations state this can only occur when a valid opt out notice had been received. The Scheme Rules do not allow for a refund of contributions outside of the opt out period. This means Mr S has become a deferred member. NEST must administer the Scheme in accordance with the Scheme Rules and any overriding legislation, so it was unable to provide Mr S with a refund of his contributions; this does not amount to maladministration.
19. I acknowledge that Mr S is unhappy with the way his complaint was handled and NEST has apologised for the level of service it has provided. I accept this would have caused Mr S some distress and inconvenience. I do not agree, however, that it was sufficiently significant to warrant an award; the apology was a reasonable response to the complaint.
20. I do not uphold the complaint.

Anthony Arter

Pensions Ombudsman
10 December 2020