Ombudsman’s Determination

Applicant	Mr N
Scheme	NEST Pension Plan (**the Plan**)
Respondent	Mackintosh Homes (Highland) Ltd (**the Employer**)

Outcome

1. Mr N’s complaint is upheld and, to put matters right, the Employer shall enrol Mr N into a new account in the Plan and ensure that it pays £1,855.35 in unpaid pension contributions.

2. The Employer shall also make sure that Mr N is not financially disadvantaged by its maladministration. It shall arrange for any investment loss to be calculated and paid into the new account in the Plan.

3. In addition, the Employer shall pay Mr N £1,000 for the serious distress and inconvenience it has caused him.

Complaint summary

4. Mr N has complained that the Employer, despite deducting contributions from his pay, has failed to pay them into the Plan.

5. Mr N has said that the missing contributions for the 2020/21 tax year amounted to £1,855.35. This is made up of employer contributions of £795.10 and employee contributions of £1,060.25.

Background information, including submissions from the parties

6. The sequence of events is not in dispute, so I have only set out the salient points.

7. On 4 June 2001, Mr N began his employment with the Employer.

8. Between 8 April 2020 and 4 April 2021, the Employer failed to pay contributions into the Plan.

9. On 19 September 2020, Mr N received a letter from NEST which confirmed that the Employer had been reported to The Pensions Regulator (**TPR**) for late payment of contributions.

10. On 27 October 2020, Mr N's representative (**the Representative**) contacted the Employer to enquire about the missing contributions.

12. On 17 December 2020, the Representative contacted the Employer again as the pension contributions from April 2020 onwards remained unpaid. The Representative asked the Employer if it intended to pay the contributions.

13. On 23 February 2021, The Representative contacted the Employer once again as Mr N had received another letter from NEST showing the contributions remained unpaid. The Representative informed the Employer that it would refrain from making a formal complaint until 1 March 2021, to give the Employer time to pay the outstanding contributions.

14. On 17 March 2021, Mr N received a letter from the Employer which advised that, from 6 April 2021, his employer would no longer be Mackintosh Joinery Limited but will, instead, be Mackintosh Homes (Highland) Ltd.

15. On 6 April 2021, Mackintosh Joinery Limited transferred to Mackintosh Homes (Highland) Ltd. No further contributions were deducted from this date. This was not authorised by Mr N as he wished for pension contributions to continue.

16. On 25 May 2021, the Representative contacted the Employer as Mr N still received weekly emails from NEST which informed him of non-payment of contributions.

17. On 28 May 2021, the Representative contacted the Employer again and confirmed that Mr N's payslips showed no pension contributions had been deducted since 6 April 2021.

18. On 31 May 2021, the Representative contacted the Employer again and raised the issue of unpaid contributions. The Representative also said it would seek legal advice for the unpaid contributions for the year 6 April 2020 to 5 April 2021 as they had still not been paid.

19. On 4 June 2021, the Representative contacted the Employer again as Mr N's pay slip still did not show that the pension issue had been rectified.

20. On 8 June 2021, the Representative raised a formal complaint with the Employer. It said:-

    - It first notified the Employer about the issue of unpaid contributions in April 2020.
    - The Employer needed to contact NEST to find out the value of the pension as of 5 April 2021, to rectify the balances.
    - Mr N did not opt out of the Plan, so it is the Employer's responsibility to reinstate him. The Employer should also calculate the contributions that should have been paid, had he remained contributing beyond April 2021.
    - If the situation was not resolved by 18 June 2021, then it would contact The Pension Ombudsman (**TPO**) and raise a formal complaint.

- Failing to put eligible staff into a pension scheme and knowingly proving false information in a declaration of compliance were criminal offences.

21. On 14 June 2021, the Representative emailed the Employer and requested Mr N's contributions be brought up to date.

22. On 21 June 2021, the Representative contacted the Employer to chase up the unpaid pension contributions.

23. On 30 June 2021, the Employer emailed the Representative and provided information from its payroll department regarding the attempts it made to resolve the unpaid contributions.

24. On 19 July 2021, Mr N submitted an application to TPO.

25. On 16 October 2021, the Employer enrolled Mr N into a new pension plan with NOW Pensions (**the New Plan**).

26. On 22 October 2021, the Employer resumed the payment of pension contributions into the New Plan and paid £680.97.

27. On 20 February 2022, Mr N received a letter from NOW Pensions which confirmed the value of his fund was £1,343.95. This consisted of payments made by the Employer between 22 October 2021 and 4 February 2022.

28. On 2 September 2022, the value of the New Plan was £2,518.33.

29. On 6 September 2022, Mr N received an email from NEST which confirmed it had reported the Employer to TPR for late payment of contributions.

30. On 16 December 2022, the Employer agreed it would pay all outstanding contributions for the 2020/21 tax year and onwards into the New Plan.

31. On 19 January 2023, Mr N's payslip showed deductions of £417.65 which were paid into the New Plan.

32. On 22 March 2023, NOW Pensions confirmed it could not accept the payment for the 2020/21 tax year as this related to a period before Mr N was enrolled into the New Plan. It also said contributions had to be related to specific pay periods and be based on the employee's salary whilst a member of NOW Pensions. The payment for the 2020/21 tax year was subsequently returned.

33. On 31 March 2023, the Employer agreed to pay the outstanding contributions for the 2020/21 tax year totalling £1,855.35 plus 8% interest into the Plan.

34. On 19 April 2023, NEST contacted TPO and clarified its position regarding the payment of the outstanding contributions from 2020/21 tax year. This was also sent to both the Employer and Mr N. It said:-

- The Employer would need to make the contributions via an exception schedule on the employer account.

- If the account is closed the Employer would need to set up a new account with NEST and enrol Mr N again to make any outstanding payments.

35. NEST explained that the reason for this was that, if the member made the payment directly, a tax relief issue would occur, and they would not be able to distinguish the employee contributions (which are entitled to tax relief) from the employer contributions (which are not entitled to tax relief).

36. On 27 April 2023, Mr N said that the Employer had offered to pay him directly in order to settle his claim. He also said the Employer was not prepared to set up a new account with NEST for Mr N to facilitate the payment.

Caseworker's Opinion

37. Mr N's complaint was considered by one of our Caseworkers who concluded that further action was required by the Employer as it had failed to remit the contributions that were due to the Plan. The Caseworker's findings are summarised below:-

    - The Caseworker stated that TPO's normal approach, in cases such as these, was to seek agreement from all parties on the facts of the complaint, including the dates and amounts of contributions involved. He said that, although the Employer initially made a payment into the New Plan, this was returned by NOW Pensions, as it was unable to accept a payment for a time period before Mr N was enrolled.

    - The Caseworker said that NEST had explained to the Employer that it would need to set up a new account for Mr N and enrol him again to make any outstanding contributions for the 2020/21 tax year. However, the Employer was not willing to complete this process.

    - The Caseworker said the Employer should enrol Mr N into a new plan with NEST to facilitate the payment of outstanding contributions for the 2020/21 tax year. He said that the Employer should also establish whether the late payment of contributions meant fewer units had been purchased and, if so, pay the cost of purchasing any additional units to make up the shortfall.

    - The Caseworker said that the amount of contributions which were not remitted to the Plan were agreed by both parties. So, in the Caseworker's Opinion, it was clear that contributions had been deducted from Mr N's salary but had not been paid into the Plan. In addition, the Employer had not paid any of the employer contributions that were due over the same period. As a result of its maladministration, Mr N was not in the financial position he ought to be in.

38. The Employer did not respond to the Caseworker's Opinion and the complaint was passed to me to consider. I agree with the Caseworker's Opinion.

Ombudsman's decision

39. Mr N has complained that the Employer has not paid all the contributions due to the Plan.

40. I find that employee contributions were deducted but held back by the Employer and not paid into the Plan. The Employer failed to rectify this, despite the Caseworker issuing instructions on how to pay them into the Plan. It did not engage with TPO or Mr N and failed to respond to the Caseworker's Opinion.

41. The Employer's failure to pay employee and employer contributions into the Plan amounts to unjust enrichment and has caused Mr N to suffer a financial loss. The Employer shall take remedial action to put this right.

42. Mr N is entitled to a distress and inconvenience award in respect of the serious ongoing non-financial injustice which he has suffered. In my view, Mr N's distress and inconvenience was exacerbated by the Employer's failure to respond during TPO's investigation into Mr N's complaint.

Directions

43. To put matters right, the Employer shall, within 28 days of the date of the Determination:

    (i) Pay Mr N £1,000 for the serious distress and inconvenience he has experienced;

    (ii) Enrol Mr N into a new plan with NEST and pay £1,855.35 into Mr N's account. This figure represents the outstanding pension contributions for the 2020/21 tax year;

    (iii) Once Mr N has been enrolled, establish with NEST whether the late payment of contributions has meant that fewer units were purchased in the new account for Mr N, than he would have otherwise secured, had the contributions been paid on time; and

    (iv) Pay any reasonable administration fee should NEST charge a fee for carrying out the above calculation.

44. Within 14 days of receiving confirmation from NEST of any shortfall in Mr N's units the Employer shall pay the cost of purchasing any additional units required to make up the shortfall into Mr N's new plan with NEST.

CAS-75445-R4X4

Anthony Arter CBE

Deputy Pensions Ombudsman

7 May 2024