

Ombudsman's Determination

Applicant	Mr N
Scheme	Newcastle Building Society Group Personal Pension Scheme (the Scheme)
Respondent	Newcastle Building Society Group (NBS Group)

Outcome

1. I do not uphold Mr N's complaint and no further action is required by NBS Group.

Complaint summary

2. In summary, Mr N is complaining that NBS Group should have taken action to prevent him from automatically enrolling in the Scheme. As a consequence, he exceeded the Lifetime Allowance (**LTA**) limits, resulting in excess tax charges payable to HMRC.

Background information, including submissions from the parties

3. NBS Group has confirmed that it is responding to the complaint on behalf of Newcastle Building Society (the parent company) and Newcastle Financial Advisors Ltd (Mr N's former employer). For ease of reference, the respondent is referred to as NBS Group.
4. NBS Group offer the Scheme to employees, which is an auto enrolment arrangement. At the time Mr N re-joined NBS Group in 2016, certain management employees were offered an additional arrangement, known as enhanced contributions, via salary sacrifice. This allowed those members and NBS Group to pay additional employee and employer contributions above the statutory minimum, but was not compulsory. This was not a separate pension scheme and members had to complete a payroll deduction form in order to make additional contributions. This had no impact on the auto enrolment process.
5. In relation to the auto enrolment process, an employer must auto enrol an eligible employee from the date after the transitional period or from the end of a

postponement period. The employer has a number of legal requirements it must meet in the “joining window” (the six week period from the eligible employee’s automatic enrolment date), but can apply for a postponement. Automatic enrolment is compulsory, but ongoing membership is not and the eligible employee can opt out of scheme membership within a month of joining. Postponement gives the employer an additional “waiting period” to a date of their choosing and then the auto enrolment process begins. Postponement can start from the date the employee is assessed as being eligible. In other words, this can only be done once an employee’s pay has been assessed as being within the permitted limits. The Pensions Regulator (TPR) considers information sent via email to be a reasonable form of providing information to members. More information on the auto enrolment process can be found in TPR’s guidance “Detailed guidance for employers Automatic enrolment: An explanation of the automatic enrolment process”¹.

6. Mr N previously worked for NBS Group from 2011 to 2014. He was provided with a copy of the then scheme booklet, of which he retained a copy. It stated:

“The Society, as with all employers, will be required to enrol all qualifying staff in a workplace pension scheme as a result of new legislation and the terms of joining the Personal Pension Scheme may be amended to reflect these requirements. Our current understanding is that these new rules will apply to the Society from September 2013.”

7. Mr N applied for a position with NBS Group in 2016 and during his interview the issue was raised that he was close to his LTA limit. There is no documentary evidence submitted by either Mr N or NBS Group to show that Mr N specifically requested to opt out of the Scheme. There is also no documentary evidence that Mr N had applied for any LTA linked protections from HMRC at this time.
8. Mr N was sent an offer letter dated 5 September 2016 (which Mr N signed on 10 September 2016). In relation to the Scheme, this letter said:

“Pension

The Society operates an auto enrolment pension scheme. Upon commencement of your employment with the Society you will be assessed for eligibility and will receive further information from Aegon our pension provider at this time.”

9. Mr N was also sent a contract of employment. Within the pack is a reference to a document “Pension Option Form”. Attached was a document headed “Newcastle Building Society Personal Pension Scheme Payroll Deduction Form” (**the payroll deduction form**). The form referred to amending a member’s monthly contributions and makes no reference to opting in or out of the Scheme.
10. Mr N signed and returned his contract of employment on 10 September 2016. In doing so, he agreed to the statement: “By entering into this Agreement, you consent

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

to the payment of any contributions due under the GPP Scheme and to the deduction from your wages of such sum.” Mr N did not complete or return the payroll deduction form.

11. On 17 October 2016, Mr N’s employment started. NBS Group state that he was first assessed for auto enrolment in the November 2016 payroll and the decision was made to postpone his enrolment for three months. A statutory notice of the postponement was sent via email to Mr N’s work email address on 12 December 2016 by Aegon, the Scheme administrator. The email was headed “Important information from your employer about workplace pensions” and was sent via the email address of “pensionqueries”. This email confirmed his employer had deferred his enrolment until 1 February 2017 and that he would be automatically enrolled from that date, if he did not opt to join the scheme earlier. It also stated that any questions could be raised via the email address “pensionqueries@newcastle.co.uk”.
12. On 20 December 2016, an email was sent to Mr N (and other colleagues) from his line manager. It followed a discussion regarding the enhanced contribution arrangement and reattached the payroll deduction form, which was to be completed before 6 January 2017 in order to be included in the January payroll. The title of the email was “IMPORTANT – Transfer to the NBS GPP”.
13. This was followed up by a further email from Mr N’s line manager on 26 January 2017, in which Mr N was included. It clarified that the form was only to increase contributions into the Scheme and was not about transferring into the Scheme. It also stated, “Failure to do this will result in no change being applied to the Society’s employer contribution.”
14. A further email regarding Mr N’s auto enrolment was sent from AEGON via “pensionenquiries” on 6 March 2017 (within six weeks of 1 February 2017). The email explained that Mr N would be automatically enrolled in the Scheme from 1 February 2017, but if he wished to opt out he would need to access the hyperlink by 5 April 2017. It also said that if Mr N had any LTA protections and did not want to lose these, then he should opt out of the Scheme. Again, contact information was given as “pensionqueries@newcastle.co.uk”.
15. On 21 June 2017, Mr N received confirmation from his other pension provider of his cash equivalent transfer value. This showed the value of his benefits as being above that year’s LTA limit.
16. On 26 June 2017, Mr N discovered that he was enrolled in the Scheme as he says this is when he was provided with his first payslip. According to the evidence provided, this is when his password on the online system was changed and his payslips were accessed for the first time. Mr N has submitted that he did not access his payslips earlier as there were technical issues with the IT department. He says he met in person with the IT department in February, April and May 2017 and, on getting no further forward, involved his line manager in June 2017. He was then given a direct contact to help with logging-in on 26 June 2017.

17. In late June and early July 2017, emails passed between NBS Group and Aegon regarding a refund of contributions relating to Mr N between January and May 2017. NBS Group updated Mr N on 28 June 2017 to clarify that it would refund June's contributions and was in touch with Aegon regarding a refund between January and May 2017.
18. Mr N applied to HMRC for Fixed Protection of his LTA on 6 July 2017. He says:

"I applied to HMRC and gained Fixed Protection 2016 thinking I had been put back in the position I was in before being employed i.e. that of not contributing into any pension after April 2016."²
19. Aegon confirmed on 12 July 2017 that a refund would not be possible unless there was a genuine error, as per HMRC guidelines. On 18 July 2017, NBS Group asked Aegon to reconsider:

"... I would like to confirm that this is a genuine error made by Mr N, and the society has followed all procedures and regulator guidelines. It would be greatly appreciated if you could reconsider your decision regarding this matter."
20. NBS Group emailed Mr N with an update on 20 July 2017. It confirmed that Aegon was unable to return any contributions from the Scheme, as only limited circumstances are permitted by HMRC to allow such a refund. It also stated:

"The circumstances we have is that payroll should have been instructed that you wished to opt out and your contributions stopped when you had been auto-enrolled. As you have now noticed at a later date once the contributions have been paid into your plan HMRC does not class this as a genuine error.

HMRC defines a genuine error as a failure of a third party to act upon the instructions of the customer at the time, so that contributions continued to be paid which is at odds with the customer's instruction at the time. As you received correspondence from Aegon to inform you that you would be postponed for 3 months then enrolled into the pension scheme, also communication the month you were enrolled telling you that your first deduction had been taken and how to opt out if you wished to not contribute. As the society has followed procedure then this cannot be classed a third party error."
21. Mr N queried this response on 25 July 2017, including questions as to the dates of payments of contributions and why a deduction was paid in January 2017.
22. A number of emails were sent on 26 July 2017. Mr N's line manager emailed Mr N to offer his support and asked for a copy of the emails sent from Aegon. He also said: "I am happy to support your case as the NFAL DM role attracts the Society GPP and not the AE scheme³." Mr N responded and stated: "Please see the two emails I

² As quoted from Mr N's letter to us dated 22 May 2018

³ This is a reference to Mr N's employment role and "AE" as automatic enrolment

missed from Aegon.” The emails were correctly dated and had been sent from NBS Group’s pension department to Mr N’s work email address.

23. NBS Group also emailed Mr N on 26 July 2017 with details of how the contributions were collected and when they were paid across to Aegon.

24. Mr N raised a complaint with NBS Group on 22 August 2017 and it replied on 30 August 2017. In the response, NBS Group clarified that:-

- there is only one pension arrangement offered by NBS Group;
- that the postponement date was 1 February 2017;
- information was sent to Mr N within the regulatory time periods;
- details on salary sacrifice;
- no evidence was provided by Mr N that he had Fixed Protection; and
- it felt that there were no administrative issues with the way in which it had complied with the auto enrolment process.

25. Internal emails within NBS Group were sent in early September 2017. These confirmed that auto enrolment details were not sent to new employees prior to it being identified through payroll, but it was looking at changing the process. The advice it received stated:

“Providing new employees with information when they join may have alleviated the situation, although it is always dependant on the member reading the information provided. While the employee guide does not cover protection, we have provided additional flyers to NBS on the matter...

With regard to HMRC’s view on protection, it would be our opinion that they would not change their stance on this matter. It is the employee’s responsibility to tell their employer they have protection & provide the relevant evidence. It is then the employer’s responsibility to not auto-enrol the employee. If the employer does not have the relevant evidence of protection, they should auto-enrol the employee to comply with their legislative requirements & avoid a fine.”

26. NBS Group also wrote to HMRC, on 14 September 2017, to support Mr N’s appeal against the loss of his Fixed Protection. It highlighted that Mr N was notified of the auto enrolment process via email and that legal advice confirmed that the process adopted was correct. However, it did mention that the advice received also confirmed that new starters should be provided with more information about auto enrolment when starting employment.

27. HMRC replied to NBS Group on 28 September 2017. It confirmed that, as it was Mr N’s responsibility to opt out of the Scheme within a month of joining, there was no discretion in the legislation that allowed reconsideration of the loss of his Fixed Protection status.

28. NBS Group provided a preliminary view to Mr N on 19 December 2017, which did not uphold his complaint. In summary:-
- It noted that the emails sent from Aegon were clear to its intention in the heading and had been forwarded from an internal NBS Group email address with the same domain name as his own work address. Therefore, they should not have been considered as advertising and it is permissible by TPR to send such information via email. It was of the view that the heading alone should have prompted Mr N to have raised questions.
 - While Mr N had discussed Fixed Protection with his line manager, he had not provided any evidence to show that this was in place and, given his experience as a financial advisor, he ought to have contacted the pensions department to make sure he had opted out of the Scheme.
 - The emails sent from his line manager in December 2016 and January 2017 were clearly not about opting out of the Scheme, but about enhancing contributions.
 - Comments were made regarding breach of employment contract in auto enrolling Mr N in the Scheme.
 - NBS Group looked into alternatives as to whether Mr N could opt out of the Scheme retrospectively or cancelling the contract with Aegon, but were unable to do so.
29. On 22 March 2018, NBS Group conducted an internal meeting with Mr N's line manager, in response to Mr N's complaint. In this, the line manager agreed that Mr N had raised his personal pension situation on a number of occasions, and on the particular point of opting out of the Scheme, the statement said: "You said 'at no point did I give the impression that I would communicate his intent to anyone' referring to [Mr N], to not join the scheme" and "You said you 'never gave the impression that I'd communicate [Mr N's] position' and everything is managed centrally on pensions regarding opting in and out. You said you may have said to [Mr N] that you 'understood why he wouldn't want to be in the scheme but I haven't said to him that I would instruct' anyone."
30. The internal meeting note also mentioned the discussions between Mr N and another employee (of the same grade as Mr N) which had caused confusion as to the difference between the Scheme and the enhanced contribution arrangement. The line manager confirmed he had not taken steps to challenge these communications. He also said there was confusion over the payroll deduction form being a contribution form or a pension option form. The line manager said that he had not seen any evidence that Mr N had any LTA protection and had not been provided with any instructions from Mr N in that regard.
31. In relation to technical issues with Mr N receiving emails, the line manager agreed that Mr N's mobile telephone had problems and was receiving triplicate copies of

emails. However, Mr N was not expected to rely solely on his mobile for work and he was regularly in the office to access his central mailbox. It was agreed that employees had difficulty in accessing online payslips, but Mr N had never raised this with him.

32. On 3 April 2018, NBS Group wrote to Mr N to say that Aegon had refunded his January 2017 contribution (£45.83).
33. NBS Group issued a formal response to Mr N's complaint on 17 April 2018. This was in response to complaints made by Mr N on 16 February 2018 and in appeal hearings on 26 February and 16 March 2018. In this letter, NBS Group did not uphold Mr N's complaint. Its reasons, in summary, were:-

- Employees are personally responsible for their own personal pension matters. Mr N's line manager was not authorised to opt him out of the Scheme. Although it was agreed that Mr N had made his line manager aware of his personal situation, he took no formal steps to make sure that he was not a Scheme member.
- The offer letter sent to Mr N prior to the start of his employment detailed that the Scheme was an auto enrolment scheme.
- Mr N received two emails from NBS Group's pension department email address, about workplace pensions, and this was sent in line with TPR guidance and therefore it had complied with the regulatory communication requirements.
- There was no evidence that Mr N had contacted the payroll department, accessed his online payslips or contacted Aegon directly in relation to his need to opt out of the Scheme.
- There was no evidence to suggest that TPR rules or relevant legislation had been breached.

34. On 15 May 2018, following information Mr N had received from Aegon, Mr N emailed NBS Group regarding the January 2017 contribution and questioned why, in his view, his start date in the Scheme changed from 1 January to 1 February 2017. NBS Group replied on 21 May 2018 saying:

"The payroll system assessed you based on your start date of 17 October 2016, therefore your enrolment date was 1 January 2017 following the three month postponement period. Further pension contributions were deducted in February and March and retained to allow time to be able to opt out and then paid to Aegon, which I believe they received on 21 April 2017. Information provided to Aegon via the Smartenroll system details our start date of 17 October 2016.

The Aegon Smartenroll system assessed you based on your first pay date which was November 2016 and therefore the enrolment date detailed in correspondence from Aegon was 1 February 2017.

Aegon have already written to you to confirm the reason why they refunded the January contribution.

The deductions taken are in line with the payroll assessment which we believe to be technically correct.”

35. As Mr N remained dissatisfied with the responses from NBS Group, he approached our Early Response Team (**ERT**) for advice and submitted a lengthy submission detailing his unhappiness with NBS Group’s investigation of his complaint. In his letter, dated 22 May 2018, he detailed a number of reasons why he disagreed (in summary):-

- He says he was promised during the interview process that he would not be enrolled in a pension scheme and that this was then done without his knowledge or consent.
- He says he was told that if he did not complete and return the payroll deduction form, he would not be a member of the Scheme.
- The information provided by his employer did not give an accurate or complete picture of the pension arrangements offered and thus he was unable to make an informed decision.
- He says his contract of employment makes no mention of the Scheme or auto enrolment.
- He claims he was not offered auto enrolment, but contractual enrolment which requires his consent to salary deductions, which he says he never gave. He says:

“I opted not to make any contributions into the contractual pension scheme by informing the employer during recruitment and again when I received my ‘new starter pack’ from the parent company and then again several times to the employer after employment had commenced. Therefore, it seems at the point I ceased active membership I was no longer an eligible jobholder or even a jobholder for AE purposes.

The process I followed to opt out (by telling the employer and by refusing to complete the salary deduction/pension contribution option form) was acceptable notification to the employer at the time and appeared to be acceptable under the scheme rules. So, I was told nothing different and was not given any other information by the employer or the parent company to contradict this, I had no reason to doubt anything other than I was an opt out employee.”

- His employer caused him a detriment by implementing their enrolment duties and this is against TPR guidance.

- He was unable to access his online payslips due to technical issues and therefore was unaware of any pension contributions being deducted from his pay. He also says that as his monthly pay fluctuated, it was not possible to notice that there had been any deductions in relation to pension contributions.
- In relation to the two emails from Aegon, he says he was doubtful that he ever received them, as he received conflicting information as to who had sent them. He also states that his work mobile telephone was defective and that it lost and resent emails. When he did receive emails in July 2017, these looked like marketing emails and, as Aegon is a company which his employer sells pension products for, it was easy to dismiss.
- He believes that the auto enrolment process was incorrect, as the postponement and enrolment notices were sent outside of the regulatory time limits. He says that he was postponed from 17 October 2016 and assessed as an eligible jobholder from 1 January 2017. Also, that as an employee that had opted out of the Scheme, he should have been reassessed in a further three years.
- His employer repeatedly told him that it was optional to be a Scheme member.

36. The ERT were unable to resolve Mr N's complaint and it was recommended that he make a formal application for his case to be investigated by us. As part of the investigation, the parties were asked for further submissions.

NBS Group's submissions

37. NBS Group provided some information previously submitted as to why it did not agree with Mr N's complaint. In addition, it provided the following (in summary):-

- NBS Group only offers one pension scheme and the Scheme qualifies for auto enrolment. However, employees are offered enhanced employer contributions with the completion of the payroll deduction form.
- It pointed out that by signing his contract, Mr N agreed to the payment of contributions from his salary to the Scheme.
- A business decision was made in December 2016 to offer the enhanced contributions to all financial advisors, rather than just management. According to NBS Group, Mr N's line manager spoke to those not already paying enhanced contributions (including Mr N) and said in order to be included in the offer, the payroll deduction form needed to be returned in time for the January 2017 payroll. It also states at no time did Mr N raise any questions.
- No IT issues were reported in December 2016 or March 2017 by Mr N. Records show he raised issues in June, July and August 2017. It also noted that Mr N had access to his emails when in the office.

- “Based on his complaint, [Mr N’s] main concern was that he would lose his Fixed Protection 2016. NBS did not know [Mr N] had any such protection (and we understand from his correspondence to the Pensions Ombudsman that he did not have such protection at that time). Whilst it is agreed that [Mr N] did say at interview and to his line manager and colleagues in passing that he was in a fortunate position with regards to his personal pension situation, he made no comment then or subsequently that he had reached his lifetime allowance (at that time) and no discussions took place regarding his pension, which would give [Mr N] any reasonable basis to maintain that NBS Group had to specifically consider his pension enrolment as a case on its own. In addition, there were no explicit verbal instructions or written instructions from [Mr N] to opt him out of the GPP. Further, [Mr N’s] comment could not reasonably be interpreted as creating an obligation on NBS Group to opt him out of the pension scheme or exclude him from NBS Group’s legal obligation to auto enrol him into the GPP.”
- It highlighted that Mr N has considerable knowledge and experience in financial advice.
- The offer of employment letter is not superseded by the contract of employment.
- As a previous employee, Mr N should know that the term “the Society” refers to the whole of the NBS Group, including any of its subsidiaries.

Mr N’s submissions

38. Mr N was also asked to provide additional comments. He also repeated some points previously made, but below is a summary of the new points raised:-

- It is his view that the offer letter did not form part of the terms and conditions of his employment and that the contract superseded the offer letter – “... the language of the above statement appears to suggest that the offer letter was followed by emails from Aegon. Indeed the statement ... also suggests the next pension information I received after the offer letter was the emails supposedly sent from Aegon. However, this is not true. In reality on the day and after I signed the offer letter I received my contract of employment.” He also said that he relied on all the information provided after the offer letter.
- NBS Group has “changed its story” in relation to where the Aegon emails were sent from by continually changing the language used when referring to them. He says he did not receive a copy of these emails until July 2017.
- At no time was it ever disclosed to him that it was NBS Group’s intention to automatically enrol him. He was never meant to be enrolled in the Scheme and this was reconfirmed by his manager and discussed with HR when he joined the company. He says he was assured that by not filling in the payroll deduction form, he would not be in the pension scheme.

- The professional advice received by NBS Group was that there were deficiencies in informing new employees of auto enrolment in the Scheme and that it should improve its processes. Mr N says that this supports his argument that he was offered contractual enrolment and that he was never informed that, if he did not complete the payroll deduction form, he would be assessed for auto enrolment.
- His line manager would not have misinterpreted the intention of the Scheme and therefore this explains why no action was taken about providing him with more information about auto enrolment. This is also evidence that NBS Group did not understand its obligations in relation to auto and contractual enrolment.
- His line manager offered contractual enrolment on an opt in basis by informing him about making enhanced contributions and he was never provided with any information about having to opt out.
- His line manager was aware of his personal situation and was privy to conversations with a colleague. Mr N says he did not intervene because his line manager thought that the correct pensions procedure had been followed. He went on to disclose his line manager's credentials and therefore trusted that the pension position confirmed by him was correct.
- It is his view that NBS Group tried to undermine him to HMRC.
- He believed he was being offered enrolment in the exact same scheme he had been offered during his previous employment with NBS Group and this is evidence of contractual enrolment.
- It was his understanding that, in signing the contract of employment, the agreement to pay contributions was only for paying enhanced contributions and not auto enrolment. He disagrees that signing it allowed NBS Group to make auto enrolment linked deductions from his salary. This is further supported by NBS Group making changes to contracts of employment from October 2017.
- There is no contract of employment between him and the parent company and therefore there is no right for it to have auto enrolled him in the Scheme.
- His contract of employment is the same as it was when he joined in 2011, along with the terms and conditions of the Scheme booklet issued at that time. He says that human resources are in agreement that the pension terms are therefore identical and supports his view that he was contractually enrolled. He says that it was optional to enrol in the Scheme at any time and this is referenced in the 2011 Scheme booklet and therefore the basis of joining the Scheme was by opting in.
- It is his view that his employment contract was breached and that his pension terms and conditions were changed, of which he was not informed.

- He disagrees that there were no administrative errors by NBS Group during the auto enrolment process, as this was supported by the report provided by its external advisors.
- He disagrees with the submission of NBS Group in relation to technical issues and instead says this shows there was a history of problems.
- He never contacted payroll, Aegon or the NBS Group about opting out because he did not know he had to and that is why there is no evidence of him taking such action.

39. The Adjudicator asked Mr N for further evidence of the IT problems he says he experienced. He said that he raised a number of issues, in person and with the IT department, when he was in the office. He has provided some emails of his contact in relation to his mobile phone and access to emails, and says that there may be more but, as he is no longer an employee, he cannot access them. The relevant emails are:-

- 29 November 2016 – this email relates to a technical issue with resetting passwords.
- 23 February 2017 – Mr N says this is evidence that attachments were deleted from emails.
- 27 April 2017 – maintenance on the system.
- 20 June 2017 – Mr N emails his manager to say that his mobile phone is broken in that it “freezes” and he is missing calls. He also notes that it is resending emails. Mr N’s manager contacts the IT department directly about the issue.
- 27 June 2017 – the IT department email to say that it is investigating further and offered another handset.

Adjudicator’s Opinion

40. Mr N’s complaint was considered by one of our Adjudicators who concluded that no further action was required by NBS Group. The Adjudicator’s findings are summarised briefly below:-

Information provided by NBS Group

- Mr N was under the impression that there were two separate schemes, when they were one and the same. The only difference being that by signing the payroll deduction form, higher contributions would be made into the Scheme, above the statutory auto enrolment minimum.
- On reading the form on its own, it is not clear what the purpose of the form is. However, the form was provided with other information to Mr N that did make it

clear. When read together, it is clear that the Scheme works on auto enrolment and therefore the payroll deduction form allows the employee to choose a higher contribution rate. This was reconfirmed in the email from Mr N's line manager on 26 January 2017.

- The line manager could have done more to clarify the situation or, at least, referred Mr N to the relevant payroll/pension department within NBS Group. Mr N ought to have been referred to someone else within the organisation to provide information to employees. The information the line manager gave in the initial email of 26 July 2017 is also incorrect and gave Mr N a false impression of the position in relation to the Scheme.
- It was agreed that there was difficulty in accessing payslips and therefore it was hard for Mr N to have known that contributions were being deducted from his wages.
- Because of this, it was the Adjudicator's view that NBS Group could have provided a better service to Mr N. However, it was also her view that this was not enough to state that there was maladministration and, on the balance of probabilities, Mr N was provided with enough information to have taken further action. Mr N was provided with clear information in the offer letter that NBS Group operated an auto enrolment scheme and Mr N would be contacted by Aegon. With Mr N's knowledge of his LTA issues, he ought to have been more proactive to make sure that he was not enrolled in the Scheme. Given his experience in the financial advice industry, he also ought to have known the importance of giving financial instructions in writing. While he did verbally discuss his LTA limits with NBS Group, there is no evidence to show that he approached those that would have had influence in relation to his Scheme membership to make sure that he had formally opted out of the Scheme.
- Following the introduction of auto enrolment legislation, schemes work on the assumption that all members are opted into a scheme, unless there is a specific instruction to opt out. It would be unusual that a scheme would only take members on the basis that they opted into the scheme. Given Mr N's experience, it would be unusual that he would have no knowledge of auto enrolment and what it meant. He clearly had some knowledge of its impact on his LTA and, again, he ought to have been more proactive.

Access to emails from Aegon and payslips

- It was more likely than not that the emails had been sent to Mr N and there was no evidence to support his argument that technical issues had an impact on this. There was also no dispute that Mr N could also access his emails while in the office. As Mr N was concerned about his LTA limit, then he ought to have been more vigilant in any information he was sent regarding employment related pensions. It is not enough that he thought these were not

relevant to him. NBS Group had correctly provided the information in line with TPR guidance.

- In regards to his payslips, there was no evidence that he made a formal complaint about this before June 2017 and he could have done more to chase this over the eight month period. However, as previously mentioned, it was agreed that NBS Group could have done more to make sure employees could access information.

Contractual enrolment versus auto enrolment

- The payroll deduction form is not adequate to have been used as a document for opting in or out of the Scheme and makes no reference in this regard, only to increasing contributions. NBS Group could not act on an instruction to opt out of the Scheme unless Mr N made a formal request. Even if it were to be considered contractual enrolment, he still would have needed to make a formal request to opt out of the Scheme to avoid any LTA implications.
- NBS Group only offers auto enrolment which is in line with the information provided to Mr N in the offer letter. The onus was on Mr N to have read it and raised any questions in relation to the opting out process.

Auto enrolment process

- There was no evidence to support Mr N's argument that the auto enrolment process was flawed, or that NBS Group acted outside of the regulatory guidance and relevant legislation in relation to the timescales adopted and the information being provided by email. Therefore, the Adjudicator's view was there had been no maladministration with regards to the auto enrolment process.

41. Mr N disagreed with the Adjudicator's decision and submitted a lengthy submission. As the response needs to be summarised, only the key arguments are listed below:-

- Mr N raised a number of new complaints in relation to Aegon. As Aegon are not a party to the original complaint, Mr N was informed that the investigation would not be expanded at this late stage of the process. However, Mr N is within his rights to make a separate complaint to Aegon regarding those matters.
- Mr N made a request for the Ombudsman to hold an oral hearing on the basis that there is conflicting information between his version of events and NBS Group which can only be dealt with by the Ombudsman via an oral hearing.
- NBS Group did not provide clear comprehensive information and therefore, as an employee, he was "blind". It is his view that this was an abuse of power. He also submits that it would not have been practical to have questioned the

position with NBS Group or his line manager on re-joining the company and this would have put his employment at risk.

- The Adjudicator ignored his line manager's witness statement and that this supports his case.
- Information provided by his line manager should be classed as negligent misstatement.
- NBS Group should agree to cancel his membership of the Scheme because he never received the policy documents or schedule. It is also his view that these documents do not allow for auto enrolment at the time he re-joined NBS Group.
- The Ombudsman should make a direction that mitigates his loss and he should be compensated for being provided with wrong and incorrect information.
- He reiterated that he made it clear during his interview and prior to taking up employment that he did not want to be a scheme member.
- He states; "Your Policy Conditions' GPP V13B ... indicates that there is no enrolment or plan in existence until Mr N is actually issued with a Schedule containing a start date, name of employer and contribution details."
- The email from Aegon relating to the postponement period specifically makes reference to opting into the Scheme.
- He reiterated his argument that he was contractually enrolled, rather than automatically enrolled.
- That the Society is not the same as NBS Group or his actual employer.
- That, despite his work in the financial advice industry, Mr N has no knowledge of auto enrolment and has not kept his knowledge up to date since 2014.
- He reiterated his argument in relation to technical difficulties at the time of the Aegon emails, including the deletion of emails with attachments.

42. Mr N has also recently submitted information following a subject access request with Aegon. He received copies of redacted emails. Mr N states that these show Aegon was aware that the auto enrolment process was flawed and that there was contractual enrolment.

43. NBS Group agreed with the Opinion and had no further comments. However, the Adjudicator asked it to confirm whether there were attachments to the Aegon emails sent on 12 December 2016 and 6 March 2017. It confirmed the email of 12 December 2016 had no attachments. The email of 6 March 2017 contained three pdf attachments relating to key features documents.

44. As Mr N did not accept the Adjudicator's Opinion, the complaint was passed to me to consider. Mr N has provided his further comments which do not change the outcome. I agree with the Adjudicator's Opinion and I will therefore only respond to the key points made by Mr N for completeness.

Ombudsman's decision

45. Mr N has made a request that I hold an oral hearing in relation to his complaint. Oral hearings are rarely held and only if I believe that there is insufficient information contained within the papers submitted to make a Determination. There would have to be serious doubt over the evidence presented and/or the need to question witnesses, which would have a likely impact on the outcome of the complaint.
46. In this case, an oral hearing is not necessary. The parties have both submitted a large volume of documents and I do not think anything further would be gained by questioning the parties in person. Mr N is adamant that discussions were held prior to the beginning of his employment that he was not to make contributions to a pension scheme, and NBS Group are also adamant that no specific instruction was provided by Mr N at any time. An oral hearing would not change the position of the parties. It also would not change the fact that there is no documentary evidence to support Mr N's position that he did not wish to be auto enrolled in the Scheme.
47. It is clear that Mr N did not in fact have Fixed Protection at the time he re-joined employment with NBS Group in 2016 or at the time he was auto enrolled. In the circumstances his employer had no choice but to auto enrol him. It was required to do so by law because his employer had no reasonable grounds to believe he had fixed protection at the relevant time.
48. According to TPR guidance⁴:

"105. In the regulator's view, 'having reasonable grounds to believe means that the employer must actually believe that the worker has the protection, and there must be evidence which would lead a reasonable person to believe this. Workers have to apply to HMRC for these protections and so will have documentation from HMRC detailing the type of protection from tax charges they have. Sight of a copy of the certificate issued by HMRC to the worker for example would be one way of giving the employer reasonable grounds to believe that the relevant protection applied, as would documented confirmation from the worker that they have this protection. Other evidence from the worker may also be sufficient.

106. Where this exception applies, the employer can choose whether to apply the automatic enrolment duty or automatic re-enrolment duty to that worker in the event either duty is triggered but is not required to. All the other duties and safeguards continue to apply as usual."

⁴ "Detailed guidance for employers no.1 Employer duties and defining the workforce"

49. NBS Group's duty was to enrol Mr N, to inform him that it had happened and tell him how to exercise his right to opt out again.
50. I am satisfied on the balance of probabilities that NBS Group sent emails telling Mr N that he had been enrolled and how to opt out within the statutory timeframes. The relevant emails were headed "Important information from your employer about workplace pensions". It may be that Mr N did not open them, but I am satisfied that he had adequate notice of the auto enrolment process which was taking place and what he needed to do to opt out.
51. Mr N has made a submission that emails with attachments were sometimes deleted. The copies of the emails forwarded by Mr N to his line manager on 26 July 2017 make no reference to attachments and the relevant information and opt out link are contained within the body of the emails. NBS Group has confirmed that the first email relating to the postponement period did not contain any attachments. This would indicate that there was no reason as to why Mr N did not receive that email, and there is no specific IT issue at that time that supports why it would not have been received. There is no specific confirmation about the second email, but equally, there is nothing specific to state that there was an IT issue on the day that email was sent. Although Mr N has stated, and I accept, that he had problems with his mobile phone, he has never asserted that he had no access to his emails. I agree with the Adjudicator that, on the balance of probabilities, these emails were sent and received by Mr N and, for whatever reason, he chose not to open them.
52. It has been stated in the Opinion that NBS Group could have done more in relation to the information it gives to new employees. But this does not automatically mean that there has been maladministration causing an injustice. As pointed out by the Adjudicator, there was sufficient information available to Mr N to have alerted him to the fact he was being auto enrolled in the Scheme. I cannot make an award in relation to any of Mr N's claimed losses or distress and inconvenience if there is not a finding that maladministration took place.
53. While Mr N has also submitted further information from Aegon which he states supports his view that he was incorrectly auto enrolled in the Scheme, I disagree. The emails are redacted, so it is unclear as to whom the opinion on Mr N's claim is being sent to and from. Also, all the emails show is one party's perspective that Mr N had made NBS Group aware of his protection status, when, at the time he joined the Scheme, he did not have Fixed Protection. I reiterate the findings above that, regardless of this, Mr N had been provided with enough information via other avenues to have been aware of the situation in relation to his auto enrolment in the Scheme. The information in the emails provided as part of the subject access request do not change this position.
54. Part of Mr N's new argument is that he was not provided with the policy documents or schedule and that this does not allow for auto enrolment. I do not think the provision of these documents is relevant to the complaint. The documents do not specifically need to refer to auto enrolment as overriding legislation provides for this.

55. The auto enrolment process instigates scheme membership in line with the statutory framework.
56. Mr N has argued that his enrolment was, or should have been, contractual rather than statutory. I disagree. He did not exercise his option to opt into the scheme contractually at a higher rate of contribution. He was in fact auto enrolled under the statutory process, as evidenced by the emails sent to him.
57. Mr N mentions the email from Aegon dated 12 December 2016 a number of times in his submission pointing out that it makes reference to opting into the Scheme. I agree that it does specifically if the member wishes to do so before the end of the postponement period, rather than waiting to be auto enrolled. It is not, as Mr N suggests, indication that the Scheme was by its nature an opt in arrangement. Nor does it imply that he personally was only subject to contractual rules. The email specifically states "...employers have to enrol eligible jobholders automatically into a qualifying pension scheme if they are not already in one." The email and the follow up email in March 2016 are clearly related to auto enrolment.
58. With regards to the role of the parent company and his employer and reference to "the Society", the name or contractual relations of the parties to the employment contract do not change the nature of the auto enrolment process.
59. Mr N has also raised the issue that information provided to him should be considered as negligent misstatement. For a successful claim of negligent misstatement, Mr N would need to prove that a statement was made to him that was false, and that he relied on it in good faith. I accept that conversations took place between Mr N and his line manager. I have read the notes of the meeting signed by that line manager. They contain no evidence that a representation was made to Mr N that he would not be auto enrolled. I am satisfied that Mr N was provided with enough information to know that he was to be auto enrolled in the Scheme.
60. I acknowledge Mr N's point in relation to not needing to have specific knowledge of auto enrolment to undertake his employment with NBS Group. However, Mr N has more knowledge than a lay person, enough to have understood the basics of auto enrolment and the effect that scheme membership would have on his LTA. Mr N would have enough experience to know that financial instructions are better placed in writing and to know that documents, including emails, should be read and queried if there are discrepancies. I can see no evidence to suggest Mr N was prevented from raising any pension queries or that this would, as he claims, be likely to have had an impact on his employment status.
61. As to the issue regarding the start date of the auto enrolment process, I can see no evidence of maladministration. According to TPR guidance, an employer can choose to use postponement on certain dates. If the employer has a staging date, they can use postponement on:
 - a) their staging date, in respect of any workers employed on their staging date;

- b) the first day of employment, in respect of any worker starting employment after the employer's staging date; or
 - c) the date a worker employed by them meets the criteria to be an eligible jobholder after the employer's staging date.
- 62. Mr N has argued that the deduction made in January 2017 is evidence that the auto enrolment process was incorrectly administered. Mr N started work part way through October 2016 and his auto enrolment was postponed.
- 63. It is clear from the email correspondence that the auto enrolment date originally notified to Mr N was 1 February 2017. Plainly there was an administrative error in that, despite that communication by Aegon, a payroll deduction was made by NBS in January 2017. It was also accepted by Aegon. To that extent there was maladministration. However, the maladministration of taking the January 2017 deduction has now been resolved. That deduction was refunded which puts Mr N back into the position he ought to have been in if the deduction had never been made. I recognise that this outcome is not to Mr N's satisfaction because it does not solve the problem in respect of loss of fixed protection, but it represents the remedy which I would usually award for a deduction made in error. That error does not itself change the fact that the auto enrolment process took place, that Mr N was informed that there was an auto enrolment arrangement or that he failed to opt out of that arrangement at any time before June 2017. I note Mr N's argument that the systems used by NBS Group and Aegon amount to an error significant enough for HMRC or TPR to recognise an administrative error requiring them to cancel the auto enrolment process. I cannot speak on behalf of either of these bodies. Mr N is within his rights to take relevant matters further with them.
- 64. For the reasons above, I do not uphold this complaint.

Karen Johnston

Deputy Pensions Ombudsman
5 December 2019