

## Ombudsman's Determination

<b>Applicant</b>	Carefoot PLC ( <b>Carefoot</b> )
<b>Scheme</b>	Walter Carefoot & Sons Limited Retirement Solution Group Personal Pension Plan (the <b>Plan</b> )
<b>Respondents</b>	Royal London

### Complaint summary

Carefoot's complaint against Royal London centres on the problems it says occurred when its automatic enrolment (**AE**) arrangement for employees was being set up.

### Summary of the Ombudsman's decision and reasons

The complaint should not be upheld against Royal London because I am unable to find maladministration on its part. However, even if there was maladministration, there is no evidence that Carefoot has suffered injustice as a consequence.

## Detailed Determination

### Material facts

1. Carefoot has three subsidiary companies: Walter Carefoot & Sons (Construction) Limited (**Construction**); Walter Carefoot & Sons (Transport) Limited (**Transport**); and Walter Carefoot & Sons (Properties) Limited (**Properties**).
2. Carefoot has a pension scheme (the **Existing Scheme**) with Scottish Life (now part of Royal London). In July 2014 it set up the Plan to comply with the AE legislation.
3. Relevant extracts taken from the terms and conditions of Royal London's AE system for employers are set out in the Appendix 1.
4. The Pensions Regulator provides a series of guidance published on its website for employers and professional advisers to help with the implementation of employers' duties on AE. Relevant extracts taken from these guides are set out in Appendix 2.
5. On 10 April 2014, Scottish Life sent an email to St James's Place Wealth Management Ltd (**SJP**), Carefoot's pension advisers, saying:

"There are 3 companies, with separate staging dates. July 2014, October 2015 and 2017. In the two not staging, there are 5 & 23 employees respectively. Initially, I suggest that they bring forward the staging dates for the other 2, but from a financial point of view, I believe that [Carefoot] would not want to do this.

My main concern is how do you plan to handle the remaining staff who do not elect to join early when we come to the companies with the later staging dates?

The pensions regulator will be expecting these schemes to stage on their relevant dates and for full employer duties to fall into place, at this point it will not be possible to move these employees into the existing scheme which is staging in July of this year.

The employer will have to register each scheme separately with the TPR giving details of membership, opt out levels etc.

The problem also arises as to whether or not a provider would expect these schemes as they will be looked at individually based on their own merit from a pricing point of view. Due to potentially half the workforce joining a different scheme early I suspect you would struggle to find a provider which would offer terms or accept the scheme, and even if they did you would potentially have a company that has the workforce in 2 separate pension schemes with 2 different providers running entirely different types of auto enrolment software.

The cost of administering this alone would probably outweigh the cost or<sic> bringing all staging dates together to stage in 2014.

In short the view of the TPR is that you should be auto enrolling every worker who is on your payroll at your relevant company staging date, adding workers into the scheme that are not on the relevant payroll is not the correct thing to do as the employer duties do not apply to these individuals at this point. This is then going to cause further issues when it comes to these individuals real staging dates and the employer duties commence for the relevant company.

If Scheme 2015 has minimal numbers at the staging date will any pensions providers touch this small amount when it comes to set up? Likewise with 2017 scheme.”

6. SJP emailed Scottish Life questioning why one scheme could not be set up for all employees which would accommodate contributions at the relevant staging dates. Scottish Life responded that employees who are in the Existing Scheme are not being auto enrolled and therefore the employer duties do not apply to them. These employees cannot join the Plan.
7. On 11 April 2014, SJP emailed Scottish Life saying that having done a series of presentations to Carefoot staff, a number of questions have arisen in relation to the Existing Scheme. A few employees had requested meetings to look at the option of transferring their benefits from the Existing Scheme to the Plan at the staging date. The information received is that they will not be able to do so.
8. Scottish Life responded to SJP explaining:
  - a. that there could only be one staging date per scheme;
  - b. it had not been aware that the Existing Scheme was made up of three different companies;
  - c. while it could incorporate multiple companies into one scheme, it would require all three companies to share the same staging date;
  - d. if an employer wished to bring a staging date forward an application must be made to The Pensions Regulator (TPR) at least one month in advance of the desired staging date;
  - e. members could remain in the Existing Scheme for the time being; and
  - f. new schemes could be set up for two of the other companies in time for their designated staging dates – alternatively, the other two companies could potentially align their staging date into one scheme.

9. On 20 May 2014, SJP in an email, headed 'Bringing Staging Date Forward', to TPR said:

"I am authorised by [the Managing Director of Carefoot] to bring the staging Date<sic> forward...

- Employer name – [Carefoot]
- Employer PAYE scheme reference(s) – **065PRC3150 1 July 2014 / 065PRC461 1 October 2015**
- The new (earlier) staging date chosen and your original staging date – **Original Staging Date - 065PRC3150 1 October 2015, New Staging Date - 065PRC3150 1 July 2014**
- Employer's address and email address ...
- The name of the owner or most senior accountable person at [Carefoot]...
- Companies House registration number..."

10. In February 2015, Moore & Smalley, a firm of financial advisers, wrote to Carefoot pointing out that the weekly paid staff (15 staff) in Construction should have enrolled at the same time as Construction's monthly paid staff. In addition, Transport (with 30 weekly staff and a staging date in 2017) had enrolled its five monthly paid staff too early. Carefoot forwarded this email on to SJP, who in turn passed it on to Royal London (who had now taken over Scottish Life) for comment.
11. Royal London responded to SJP saying that as the business was made up of three separate legal entities, the staging dates for the three PAYE schemes could be staggered. If the business was one legal entity with three PAYE schemes, the staging date would be that of the largest PAYE scheme.
12. On 26 February 2015, SJP emailed Carefoot saying:

"Moore & Smalley would have been correct had the PAYE reference sat within a single legal entity i.e. One<sic> company and one company registration number. However, as Walter Carefoot & Sons (construction<sic>), Walter Carefoot & Sons (Properties) and Walter Carefoot & Sons (Transport) are 'separate' companies, 'separate' legal entities and as shown on companies house have separate registration formats there<sic> are deemed to be entirely separate and therefore they maintain their independent staging dates and indeed move them if you so wish.

...

If you remember, we had a discussion about not bringing all the staging dates to the first of July 2014 simply for cash flow purposes and so as to not increase company costs when it was unnecessary to do so. We agreed this and brought forward October 2015 to July 2014.

To ensure that I am correct on this and to further compound my thoughts I have contacted both Scottish Life and The Pensions Regulator and you will note their responses attached who are in agreement.

If I may reflect on Moore and Smalley critique of the implementation as it does concern me somewhat;

- *It is almost certain that the client will have to take some remedial action* – There is no remedial action to be taken, the AE from our perspective has been implemented seamlessly. I understand there have been Payroll issues, though these are nothing to do with the implementation and compliance.
- *I suggest you mention this to your advisor and, as I said yesterday, the legislation is new and needs interpreting but if you need any help from us please let me know* – The legislation is not ‘new’ it has been in circulation for nearly 3 years and we are abreast with all requirement and legalities. Perhaps M&S should have a read of the attached legislative handbook, I attach this for their perusal.

...”

13. On 27 February 2015, Carefoot emailed SJP saying:

“...The 1<sup>st</sup> reference is Construction and Property monthly paid...The 2<sup>nd</sup> reference is Transport Monthly...and as you can see their staging date should have been 01/10/2015, however, we brought this forward to coincide with Construction and Property Monthly. The latter two are Construction and Transport weekly paid (see lists confirming this below provided by ...who does our weekly paid staffs salaries), hence were<sic> we got our staging dates came from.

120YA71334 is Construction staff as follows ...

120UA71316 – is Transport staff as follows...

As discussed, because Transport monthly paid was originally a different staging date and both weekly paid staging dates were 2017, we did not feel the need to query the dates we were given by [SJP].”

14. On 27 February 2015, Royal London sent SJP emails making the comments set out below.
  - a. The original fact find with Carefoot highlighted that there were three different staging dates. This led to discussions around what would happen with the other two companies, as it could not facilitate the two later scheme's staging into the Plan.
  - b. Carefoot separated out the weekly and monthly workers and categorised them into the relevant staging dates. The information provided by Carefoot states twice that the 15 members in question had a 2017 staging date.
  - c. The ultimate responsibility for providing information lay solely with the employer.
  - d. It had contacted TPR who confirmed that 120YA71334 and 120UA71316 could continue to stage in May 2017.
15. On 2 March 2015, Royal London emailed SJP stating that a data fix would have to be put in place to add the weekly paid staff. However, it could not add these employees to its system until it had confirmation from TPR whether or not the contributions would be backdated. The necessary contributions could be deducted, but these could not be sent to Royal London until it had confirmation from TPR.
16. On 4 March 2015, SJP emailed Royal London saying that, in view of the recent anomalies and cancellation of a meeting, the Managing Director of Carefoot had emphatically stated that he wanted nothing further to do with Royal London with regard to the weekly paid staff. Consequently, the weekly paid staff would be placed with a different provider and SJP had communicated this to TPR.
17. On 30 March 2015, TPR emailed Carefoot saying that members of the Existing Scheme would only need to move to the AE scheme with The People's Pension if the Existing Scheme was not deemed as a qualifying scheme. TPR said that it was up to employers to satisfy themselves that a scheme was a qualifying scheme and advised Carefoot to speak to Royal London. TPR asked for timescales as to when communications will be issued to workers, when backdated contributions would be calculated and when Carefoot hoped to have all the contributions up to date.
18. On 31 March 2015, SJP emailed TPR attaching a draft letter to be sent to the weekly paid staff of Transport. The letter, from Carefoot, informed staff that they should have been auto-enrolled with the monthly staff on the 1 July 2014 staging date. It explained that this was overlooked by Scottish Life and as a result they were being placed in a scheme with The People's Pension. The letter explained that if the person was an eligible employee, money would be deducted from their salary and paid to this scheme. It also explained that they were able to opt-out of the scheme, but if they did so the company would not make any contributions on their behalf.

19. On 12 May 2015, TPR emailed Carefoot saying that it had spoken to SJP and understood that all eligible workers had now been auto-enrolled with The People's Pension. TPR added that SJP had advised that the backdated contributions would be calculated, once the opt-out period had ended. TPR asked for confirmation of the date workers were auto-enrolled, the date they achieved active membership, a redacted copy of the final communication issued to workers to inform them of the backdating exercise and a timescale as to when all contributions will be up to date.
20. On 22 July 2015, TPR emailed Carefoot saying that due to the remedial action taken by Transport and Construction to rectify the breach, no loss with regard to AE has been suffered by any of the workers. Therefore, it did not intend in taking any further action on the matter.
21. SJP, on behalf of Carefoot, made a complaint to Royal London about the service received from Royal London with regard to the AE process. SJP said that as a result, Carefoot had to work with TPR to pay backdated employer and employee contributions. The contributions totalled £7,113.27 (£3,912.99 for Construction and £3,200.28 for Transport, and Carefoot asked to be recompensed for these contributions.
22. On 19 February 2016, Royal London wrote to SJP saying:
  - a. as soon as it was made aware that there were multiple staging dates, it communicated what could and could not be done;
  - b. from what it could see from the Implementation Design Document, which was agreed with Carefoot, postponement only applied to new workers – there would not have been a gap in contributions for existing members;
  - c. it went on the basis of the information provided by SJP and Carefoot with regard to the staging dates and the company structure;
  - d. SJP had written to TPR on 20 May 2014 to request bringing forward the staging dates, but this did not include all the ones it was later told about – it does not have any access to the data held by TPR;
  - e. it can only work and validate the payroll data sent by Carefoot – ultimately, Carefoot is responsible to provide it with accurate data;
  - f. it is made clear in its terms and conditions that the employer is responsible for providing accurate data; and
  - g. it does not believe that it is at fault and therefore cannot agree to recompense Carefoot for the backdated contributions.
23. As the matter could not be resolved, SJP, on behalf of Carefoot, brought the complaint to us.

**Summary of Carefoot's position**

24. SJP, on behalf of Carefoot, say:

- a. both itself and Carefoot were left frustrated by Royal London confirming that different PAYE's could be added to a single scheme solution - it was only a few months from the staging date when it was confirmed that this was not the case;
- b. Carefoot had planned its budget based on Royal London's initial confirmation that each payroll could be dealt with separately – when Royal London subsequently could not facilitate this, an alternative strategy had to be adopted;
- c. the alternative strategy was to align a couple of staging dates together to reduce the number of pension schemes to run;
- d. the problem with the staging dates should have been picked up by Royal London as it was advertised as part of its service – the service advertised was that Royal London would make sure a company was compliant by having a slick process to help them, and each scheme would have an implementation officer aligned to assist;
- e. it had already issued letters to employees informing them of the new AE scheme and a transition from the Existing Scheme to the Plan;
- f. Royal London say that postponement only applied to new employees, but at a presentation the Implementation Manager at Royal London announced that postponement would apply to existing and new employees;
- g. it was up to the Implementation Manager at Royal London to assess the PAYEs and make sure that it could liaise with the payroll systems to ensure the smooth running of the Plan;
- h. from the data provided by Carefoot, Royal London could have provided feedback on any gaps that may have been obvious;
- i. Royal London did not provide the support it promised and actually caused additional work, cost and stress; and
- j. Royal London over simplified the problems and took little responsibility in addressing what really happened.

**Summary of Royal London's position**

25. While it provides an AE implementation service for employers and advisers, ultimately the elements to set up the scheme and its design are for the two parties, the employer and the adviser, to provide and it assumes that the details are accurate.



26. It acknowledges that some elements of its service were less than acceptable during the implementation process, however it was up to Carefoot and SJP to ensure that the data was accurate.
27. Carefoot is seeking recompense for the backdated contributions, however these contributions would have had to be paid in any case.

## **Conclusions**

28. The staging dates for the purposes of AE for employees depends on their employer's PAYE scheme reference. Because Construction, Transport and Properties were three separate companies they had separate PAYE scheme references, and therefore three separate staging dates. The staging date for the monthly paid staff for Construction and the staff for Property was 1 July 2014; the staging date for the monthly paid staff for Transport was October 2015; and the staging date for the weekly paid staff for both Construction and Transport was May 2017. Carefoot should have known the staging dates for its employees in advance of its discussions with Scottish Life/Royal London about the Plan.
29. SJP says that Royal London confirmed that Carefoot could use the Plan to auto enrol employees on the three different staging dates. Royal London's terms and conditions of its AE system is silent as to whether or not one scheme could be used for three different staging dates. In addition, I have seen no correspondence from Royal London prior to April 2014 confirming whether or not this was possible.
30. SJP says that the problem with the staging dates should have been picked up by Royal London as it was advertised as part of its service. Royal London would have been informed of the stages dates by SJP or Carefoot. The earliest correspondence we have on this matter is Royal London's email of 10 April 2014, informing SJP that the Plan could not be used to auto enrol Carefoot employees on staging dates other than 1 July 2014. There is nothing in the evidence to show that Royal London had been informed of the different staging dates earlier than April 2014.
31. Royal London informed SJP in April 2014 that the Plan could not accommodate more than one staging date. If SJP felt that another provider had a pension scheme that could be used for three different staging dates, it had over two months to change providers.
32. SJP says that the Implementation Manager at Royal London told employees of Carefoot that postponement applied to existing and new employees, but Royal London now say that postponement only applies to new employees. Royal London has not confirmed or denied what its Implementation Manager may have told Carefoot employees about postponement. However, given that the staging dates for all Carefoot employees eligible to be auto enrolled was brought forward to 1 July 2014, I cannot see that postponement was an issue. Even if Royal London's

Implementation Manager had provided incorrect information, which would be maladministration, I am unable to see what injustice, if any, Carefoot has suffered.

33. The staging date for the monthly paid staff for Transport was brought forward to 1 July 2014 and these employees were auto enrolled into the Plan. The weekly paid staff for both Construction and Transport were auto-enrolled in a scheme with The People's Pension. The loss Carefoot is claiming is the combined contributions, amounting to £7,113.27, that both itself and employees had paid into the scheme with The People's Pension.
34. First, before I can consider the injustice, that is the financial loss suffered, I need to consider whether there has been any maladministration. It is apparent from my comments above, that I am unable to find maladministration on the part of Royal London. However, even if there was maladministration, I cannot agree with Carefoot's claim of the loss it has suffered. My reasons for this are:
  - a. the contributions paid to the scheme with The People's Pension would have had to be paid by Carefoot in any event once it decided to bring forward the staging date; and
  - b. Carefoot had the option to leave the staging date for these employees as May 2017, but decided to bring it forward, it was not through any fault on the part of Royal London that the staging date was brought forward.
35. Therefore, I am unable to find maladministration on the part of Royal London and do not uphold the complaint against it.

**Anthony Arter**

Pensions Ombudsman  
29 June 2017

## Appendix 1

### 1. Provision of the services

- 1.1. Royal London will make the **Services** available to you and Group Members and you agree that **Royal Life** may work with, and take instructions from your appointed **Advisers** or from any other third party authorised by you (including but not limited to any payroll provider or benefit platform) in order to do so. **You** agree that the **Services** do not include the provision of advice of any kind...

### 2. Provision of information

- 2.1. To allow Royal London to make the **Services** available, you will determine the identity of your **Workers** and provide **Royal London** with all **Worker** data, information and assistance relevant to the Scheme and the provision of the **Services**. Data and information provided by you will be accurate, complete and up to date in all material respects. It will be your responsibility to trace any missing data items.

...

### 4. The services

- 4.1 **Royal London** shall provide **Services** as described in, and subject to the terms of, Schedule 1 to this **Agreement**. The **Services** shall only be provided in relation to the **Scheme** and membership or potential membership of the **Scheme**.

...

## SCHEDULE 1 – THE SERVICES

### 2. Assessing your workforce

- 2.1. **Royal London** shall undertake an assessment of your **Workers** based on **Payroll Data** and other Worker data required by it and which must be provided by you, to identify **Eligible Jobholders**. **You** must provide the data under this paragraph 2.1 within such reasonable timescales as **Royal London** may specify.

- 2.2 You acknowledge that, for the purposes of the eligibility assessment described in paragraph 2.1 of this Schedule, you are responsible for:

2.2.1 the **Payroll Data** and other **Worker** data which **Royal London** requires and on which the eligibility assessment is based and ensuring that it is accurate, complete and up to date;

...

- 2.3. Provided that you comply with the terms of this **Agreement**, **Royal London** acknowledges that, for the purposes of the eligibility assessment described at paragraph 2.1 of this Schedule, it is responsible for determining the date of the eligibility assessment.

## Appendix 2

Extracts taken from TPR's guidance to employers is set out below:

**“Employer duties and identifying the workforce:** An introduction to the new employer duties

### Introduction

1. A number of new employer duties have been introduced that will give millions of workers access to pension provision, many for the first time.
2. What an employer needs to do will depend on whether they employ someone the legislation classifies as a ‘worker’.
3. The term ‘worker’ is specific – it does not simply apply to the working population as a whole. There are different categories of worker, determined by a person's age and how much they earn.
4. A key requirement is to automatically enrol certain workers, known as eligible jobholders, into a pension scheme that meets specific conditions to be an ‘automatic enrolment scheme’. More information on the conditions to be an automatic enrolment scheme can be found in **Detailed guidance no 4 – Pension schemes**. However, automatic enrolment is only one of the duties.
5. For all employers, compliance with the new employer duties and safeguards is compulsory. It is crucial that all employers understand how their workforce is categorised under the new legislation.

...

### Identifying whether a person is a ‘worker’

8. The first step for an employer is to see if they employ anyone classed as a ‘worker’. To do this, they need to understand their contractual relationships.
9. A worker is defined as any individual who:
  - works under a contract of employment (an employee), or
  - has a contract to perform work or services personally and is not undertaking the work as part of their own business.

...

**Getting ready:** First steps to prepare for the new employer duties

### Introduction

1. The law on the new employer duties and safeguards commenced in July 2012. Each employer is allocated a date from when the new duties will apply to them, known as their 'staging date'. The staging dates start from October 2012. Finding out their staging date should be an employer's first step in getting ready for the new duties.
2. One of these duties places new requirements on employers to automatically enrol certain workers into a pension scheme...

...

### Identifying the staging date

6. An employer's staging date is set by law and is based on the number of persons in their largest PAYE scheme. The number of persons is wholly based on the information held by the regulator from HMRC at 1 April 2012. This information records employers' names against a PAYE scheme reference and the number of persons within the PAYE scheme. Employers should be aware that earlier changes made to their PAYE schemes may not be reflected in the information held by the regulator. The number of persons in an employer's PAYE scheme may change after 1 April 2012. However, their staging date will not be affected.

...

### Assessing the workforce: How to identify the different categories of worker

#### Introduction

1. An employer must assess each member of their workforce aged at least 16 and 75 to identify into which category of worker they fall. This will determine what duties the employer will have in relation to each of those workers. The different categories of workers and the employer duties are set out in **Detail guidance no. 1 – Employer duties and defining the workforce**.
2. As part of this assessment, the key criteria for an employer are:
  - the worker's age
  - whether the worker is working or ordinarily works in the UK under their contract
  - whether qualifying earnings are payable in the relevant pay reference period.

...

#### Making the assessment

19. The assessment is broken down into three parts:
  - Assessing the worker's age – identifying whether the worker meets different age brackets (see paragraphs 21-23)

- Assessing whether the worker is working or ordinarily works in the UK under their contract – identifying where the worker is based (see paragraphs 24-51) and
- Assessing the worker's earnings – identifying whether qualifying earnings are payable in the relevant pay reference period and at what amount (see paragraphs 52-161)

20. Each part is considered separately in this guidance.”