

Ombudsman's Determination

Applicant	Miss Y
Scheme	Ansdell Road Post Office and Fyle News Group Personal Pension Plan (the Plan)
Respondent	Ansdell Road Post Office and Fyle News (the Employer)

Outcome

1. Miss Y's complaint is upheld and to put matters right the Employer shall retrospectively enrol Miss Y into the Plan and take the further steps detailed below.
2. The Employer shall also pay Miss Y £500 in recognition of the significant distress and inconvenience caused to her.

Complaint summary

3. Miss Y's complaint is that the Employer failed to automatically enrol her into a workplace pension arrangement.

Background information, including submissions from the parties

4. Section 3(2) of the Pensions Act 2008, states that "The employer must make prescribed arrangements by which the jobholder becomes an active member of an automatic enrolment scheme with effect from the automatic enrolment date."
5. In 2012, the Government began the phased implementation of legislation under the Pensions Act 2008, requiring employers to automatically enrol eligible jobholders into a workplace pension scheme.
6. In order to qualify for a pension under the automatic enrolment legislation, eligible jobholders were defined as workers who met the following criteria:-
 - Aged between 22 years old and the state pension age.
 - Receiving wages in excess of £10,000 a year. This is known as the earnings threshold and the employee is assessed for eligibility at each pay period. The earnings threshold is pro-rated meaning the actual earnings threshold amount differs depending upon whether the employee is paid monthly, four-weekly, fortnightly, or weekly. An employee who is paid monthly will be deemed to meet

the earnings threshold if their monthly earnings reach at least £833. If they are paid 4 weekly they are deemed to meet the earnings threshold if their 4 weekly earnings reach at least £768.

- Ordinarily working in the UK and having a contract of employment.
7. On 21 August 2012, Miss Y started working for the Employer. Her contract of employment (**the Contract of Employment**) stated that she would be paid the national minimum wage for working 20 hours a week.
 8. On 12 February 2016, the Federation of Small Businesses (**FSB**) emailed the Employer to confirm a telephone appointment for 25 February 2016, in order to discuss an application for providing the Employer with support in the administration of its workplace pension.
 9. On 25 February 2016, FSB emailed the Employer to provide assistance in processing the payroll relating to its workplace pension. With regard to the earnings basis for automatic enrolment purposes, FSB noted 'Basic Pay'.
 10. On 26 February 2016, the Employer completed an online application form (**the online application**), in order to create the Plan with its provider, Legal & General (**L&G**).
 11. A screen print of the online application confirmation provided by L&G shows that the Employer chose 'Tier 2' qualifying earnings as the basis for eligibility to automatic enrolment under the Plan, meaning that overtime pay should be included.
 12. On 29 March 2016, FSB emailed the Employer to confirm it had completed the application process for registration to FSB's Employer Portal and the Employer could access online guidance regarding the Plan.
 13. On 21 May 2016, the Employer held a staff meeting during which its employees were offered the opportunity to join the Plan. The Employer has said that Miss Y rejected the offer on the basis that she could not afford to make contributions, and a letter was handed to her stating:-

"If you want to join [the Plan], tell us in writing by sending a letter which has to be signed by you...In the future if you earn more than £192 per week (or £833 per month), are over the age of 22, and you have not joined the scheme, we will automatically enrol you and tell you we have done this."
 14. Miss Y has said that she was not present at the meeting and she did not reject an offer to join the Plan.
 15. Three other employees have provided written evidence to the Pensions Ombudsman that they attended the meeting, and that Miss Y declined the opportunity to join the Plan.
 16. On 1 July 2016, the Employer reached its staging date under the automatic enrolment legislation and had to start offering a pension to its eligible jobholders and then pay in contributions, unless the eligible jobholder opted-out of the pension arrangement.

17. On 16 October 2016, The Pensions Regulator wrote to the Employer and confirmed that:-

- A completed declaration of compliance under the Pensions Act 2008 had been received from the Employer.
- It had been noted that the Employer uses the Plan for automatic enrolment.

18. On 1 May 2018, Miss Y left her employment.

19. On 16 August 2018, Miss Y wrote to the Employer and complained that:-

- Having spoken to The Pensions Regulator, she had established that the Employer's staging date for auto enrolment purposes was 1 July 2016.
- She had been eligible to be enrolled in a workplace pension arrangement provided by the Employer from that date and the Employer should have made contributions into the Plan on her behalf.
- She would like the Employer to comply with the automatic enrolment legislation and confirm when it had completed her retrospective enrolment.

20. Miss Y has received no response to her complaint from the Employer.

The Employer's position

21. The Employer says:-

- Miss Y had not been an eligible jobholder and did not qualify for automatic enrolment, because her wages were less than £10,000 a year.
- During a staff meeting held on 21 May 2016, Miss Y and three other employees were offered the opportunity to join the Plan. Miss Y rejected the offer on the basis that she could not afford to make contributions.
- Miss Y is not entitled to receive backdated employer contributions.

Miss Y's position

22. Miss Y says:-

- While working for the Employer she became aware of her entitlement to a workplace pension.
- She had asked the Employer about this matter and was told there was no entitlement to a pension and that it was not worth claiming anyway.
- The Employer did not offer her the opportunity to join the Plan, and she would not have rejected joining on the basis of having to make employee contributions of around £6 a week.

- She is happy to pay any outstanding employee contributions in order to receive backdated contributions from the Employer.
- The Employer paid her wages on a four-weekly basis and the payments quoted in various payslips are evidence of her eligibility for automatic enrolment during the periods ending on or around the following dates:-

Date	Gross Pay
23 February 2015	£897.00
23 March 2015	£884.00
23 February 2016	£855.93
20 April 2017	£1,090.50
20 June 2017	£975.00
20 July 2017	£903.75
20 August 2017	£1,293.75
20 September 2017	£922.50
20 October 2017	£1,023.75
20 December 2017	£872.50
20 January 2018	£993.75
20 February 2018	£918.75

Adjudicator's Opinion

23. Miss Y's complaint was considered by one of our Adjudicators who concluded that further action was required by the Employer. The Adjudicator's findings are summarised below:-

- Section 3(2) of the Pensions Act 2008 requires the Employer to automatically enrol eligible jobholders into a suitable pension arrangement with effect from its staging date, which in this case is 1 July 2016.
- Under the Contract of Employment Miss Y's wages would not have been sufficient for her to meet the criteria of an eligible jobholder. However, the payslips Miss Y has supplied as evidence show that she became eligible for automatic enrolment during the periods those payslips cover.
- Miss Y's wages were clearly in excess of the earnings threshold, the minimum requirement to trigger automatic enrolment and receive contributions from the Employer.
- Despite Miss Y's complaint of 16 August 2018, the Employer has failed to acknowledge her entitlement.
- The Employer has not provided any evidence that Miss Y opted-out of the Plan or that she had rejected the offer to join on the basis that she could not afford to make contributions.

- Consequently, the Adjudicator considered the Employer's failure to automatically enrol Miss Y, as required under Section 3(2) of the Pensions Act 2008, to be maladministration, which would have caused Miss Y significant distress and inconvenience.
- The Adjudicator considered that the Employer should enrol Miss Y into the Plan with effect from the first date she achieved the minimum triggering amount for automatic enrolment purposes. The Employer should also pay into the Plan the required employer contributions for the eligible automatic enrolment periods of Miss Y's employment.
- Further, the Employer should ascertain the position Miss Y's pension fund would have been in, had the contributions been paid at the correct time, in relation to any growth in the pension fund, and add the resulting amount to the contribution payment.

24. Miss Y accepted the Adjudicator's Opinion, but the Employer did not, and the complaint was passed to me to consider. The Employer provided its further comments which do not change the outcome. I agree with the Adjudicator's Opinion and note the additional points raised by the Employer.

The Employer's additional comments

25. There has been no failure to comply with Section 3(2) of the Pensions Act 2008 in relation to the automatic enrolment of Miss Y.
26. Each employee, including Miss Y, had a 20-hour contractual working week. Their eligibility for automatic enrolment was based on pensionable earnings, which did not include overtime pay.
27. Miss Y's earnings covering the periods ending around 23 February 2015, 23 March 2015 and 23 February 2016 were paid before the staging date and would not have triggered automatic enrolment.
28. The gross wages quoted in each of the other payslips provided by Miss Y as evidence of her eligibility for automatic enrolment are misleading, because they include overtime payments, which do not need to be taken into account.
29. Miss Y's wage slip for the period 21 February 2018 to 20 March 2018 quotes gross pay of £11,506.75 covering the whole 2017/2018 tax year. But that figure includes overtime pay of £3,153.75. So, Miss Y would not have been eligible for automatic enrolment during the relevant tax year.
30. Miss Y's payslips provided to her between 2016 and 2018 show that her annual earnings were less than £10,000. So, she was not eligible for automatic enrolment.
31. During a staff meeting held on 21 May 2016, Miss Y and three other employees were offered the opportunity to join the Plan and a letter was also given to each of them stating:-

“If you want to join [the Plan], tell us in writing by sending a letter which has to be signed by you...In the future if you earn more than £192 per week (or £833 per month), are over the age of 22, and you have not joined the scheme, we will automatically enrol you and tell you we have done this.”

32. In response Miss Y said that due to other financial commitments, she could not afford to make contributions, and declined the offer to join the Plan.
33. Miss Y was not asked to confirm that decision in writing, because she was trusted in providing a verbal response. However, three other staff members who were present at the meeting have provided written evidence to the Pensions Ombudsman that Miss Y chose not to join the Plan.
34. FSB completed the online application and a copy of FSB’s email of 29 March 2016 showing its agreement to act on the Employer’s behalf has been provided to the Pensions Ombudsman.
35. A copy of FSB’s email of 25 February 2016 stating that basic pay was used as the earnings criteria for automatic enrolment has also been provided to the Pensions Ombudsman.
36. Either FSB or L&G was at fault for the Plan having been set up based on Tier 2 qualifying earnings for automatic enrolment purposes.

Miss Y’s additional comments

37. She was not present at the staff meeting held by the Employer on 21 May 2016 and was not offered the opportunity to join the Plan.

Ombudsman’s decision

38. Miss Y’s complaint is that the Employer has failed to automatically enrol her into a workplace pension arrangement.
39. The Employer contends that it has complied with Section 3(2) of the Pensions Act 2008 regarding Miss Y’s eligibility for automatic enrolment, because Miss Y had a 20-hour contractual working week, and her basic qualifying wages would not have been sufficient to trigger automatic enrolment. The Employer has also pointed to the fact that Miss Y would not have been eligible for automatic enrolment before the staging date.
40. I acknowledge that Miss Y would not have been eligible for automatic enrolment before the staging date. However, the wage slips provided by Miss Y covering the periods after the staging date clearly show that her wages, including overtime pay, triggered eligibility for automatic enrolment. The issue then is whether overtime payments should be included when assessing eligibility for automatic enrolment.
41. The Employer has suggested that, either FSB or L&G was at fault for the Plan being based on Tier 2 qualifying earnings for automatic enrolment purposes, rather than

basic pay. The screen print of the online application confirmation shows that the Employer selected Tier 2 as the earnings basis for the Plan on 26 February 2016, rather than 'Basic Pay', the equivalent of pensionable earnings, as noted by FSB in its email to the Employer of 25 February 2016. Although FSB provided the Employer with guidance in relation to its duties under the Plan, FSB did not complete the online application as suggested by the Employer.

42. Further, L&G cannot reasonably be held responsible for the options selected in the online application. I find that there is no evidence to support the Employer's claim that either FSB or L&G was at fault for the Plan being set up based on Tier 2 qualifying earnings for automatic enrolment purposes.
43. Tier 2 qualifying earnings include overtime pay, so the Employer ought to have been aware that it was incorrect to apply basic pay in order to determine Miss Y's eligibility for automatic enrolment. According to the Pensions Regulator, earnings of £768 covering a four-week period are sufficient to trigger eligibility for automatic enrolment. This has been the case since at least the 2015/2016 tax year.
44. Consequently, Miss Y has been eligible for automatic enrolment during the four-week periods in which her wages, including overtime pay, have exceeded £768 from 1 July 2016. That figure is the equivalent of around £833 per calendar month or £10,000 a year, the minimum earnings for automatic enrolment. I find that the Employer is in breach of its statutory requirement to enrol Miss Y into the Plan under Section 3(2) of the Pensions Act 2008.
45. Having established that overtime payments should be considered when assessing the earnings threshold at which automatic enrolment into the Plan is triggered there remains the dispute as to whether, or not, Miss Y opted not to join the Plan. The Employer argues that Miss Y chose not to join the Plan when she was offered the opportunity to do so during a staff meeting held on 21 May 2016. Miss Y contends that she was not present at the staff meeting and that she did not decline the opportunity to join the Plan. I acknowledge that other employees have provided written evidence that Miss Y did attend the meeting and say that she rejected the offer to join the Plan. It is often difficult with the passage of time to clearly recall events and, on the balance of probabilities, I think it unlikely any further evidence could now be provided that would establish with absolute certainty whether Miss Y was, or was not, at the meeting.
46. The Employer says that at the staff meeting employees were handed a letter which stated, "If you want to join [the Plan], tell us in writing by sending a letter which has to be signed by you ...In the future if you earn more than £192 per week (or £833 per month), are over the age of 22, and you have not joined the scheme, we will automatically enrol you and tell you we have done this."
47. Whether or not Miss Y attended the meeting is immaterial as the approach taken was incorrect, the opt-out must be in writing. The automatic enrolment legislation requires eligible employees to be enrolled into an appropriate arrangement unless the

individual chooses to opt-out in writing. The Employer should have automatically enrolled all eligible employees into the Plan and advised them how to opt-out if they wished to.

48. The Employer has failed to act accordingly and automatically enrol Miss Y into the Plan or, alternatively, to have obtained signed confirmation from Miss Y that she wished to opt-out of the Plan. I find that these failures amount to maladministration on the part of the Employer. Verbal agreement to opt-out of automatic enrolment is insufficient and, if Miss Y did indicate that she did not wish to join the Plan, the Employer should have obtained Miss Y's request to opt-out in writing.
49. I find the Employer's failings amount to maladministration which will have caused Miss Y significant distress and inconvenience.
50. I uphold Miss Y's complaint.

Directions

51. Within 28 days of the Date of this Determination, the Employer shall:

- Enrol Miss Y into the Plan with effect from the first date she achieved the minimum triggering amount for automatic enrolment purposes.
 - Provide Miss Y with details of the employee contributions that she must make to the Plan for the eligible automatic enrolment periods of her employment.
 - Upon receipt of Miss Y's employee contributions pay these into the Plan together with the required employer contributions for the eligible automatic enrolment periods of Miss Y's employment.
 - Ascertain the position Miss Y's pension fund would have been in, had the contributions been paid at the correct time, in relation to any growth in the pension fund, and add the resulting amount to the contribution payment.
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- Pay Miss Y £500 in recognition of the significant distress and inconvenience she has suffered.

Anthony Arter

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Pensions Ombudsman

25 May 2021