

## Ombudsman's Determination

Applicant	Mr Hyman
Plan	SMART Pension Plan ( <b>the Plan</b> )
Respondent	SMART Pension Limited ( <b>SMART</b> )

## Outcome

1. Mr Hyman's complaint is not upheld, and no further action is required by SMART.

## Complaint summary

2. Mr Hyman has complained that SMART did not adequately inform him that he was being automatically enrolled into the Plan.
3. SMART have refunded Mr Hyman's contributions, but he would like them to apologise and offer an award in recognition of the significant distress and inconvenience it caused him.

## Background information, including submissions from the parties

4. The sequence of events is not in dispute, so I have only set out the salient points.
5. The Pensions Act 2008 introduced a duty for employers to make arrangements by which the jobholder becomes an active member of an automatic enrolment scheme with effect from the automatic enrolment date.
6. Under the Pensions Act 2008, all employers must enrol certain workers into a pension scheme (**automatic enrolment**). Between 1 October 2012 and 1 April 2017, all employers in existence on 1 April 2012 had to begin their automatic enrolment duties. For new employers, set up between April 2013 and September 2017, their automatic enrolment duties started between 1 May 2017 and 1 February 2018. New employers from October 2017 onwards had immediate automatic enrolment duties.
7. In accordance with Part One of the Pensions Act 2008, employers are responsible for establishing whether or not they need to provide a pension scheme and what their duties are. Employers who are required to provide a pension scheme, must:-

- Set up a pension scheme.
  - Automatically enrol eligible jobholders into a pension scheme from their first day of employment and deduct pension contributions from their pay.
  - Inform staff how automatic enrolment applies to them, within six weeks of the employer duties start date.
  - Declare their compliance to The Pensions Regulator (**TPR**) within five months of their duties start date.
  - Provide enrolment information to the member that confirms that they have been or will be automatically enrolled. They should also provide information on the right to opt-out and where the member can find further information about pensions.
8. Part two of The Occupational and Personal Pension Schemes (Automatic Enrolment) Regulations 2010 introduced a duty for employers to automatically enrol eligible jobholders working for them who were not already a member of a qualifying scheme into an automatic enrolment scheme.
  9. In July 2021, Mr Hyman started working for London Borough of Redbridge Council on a contract. He owned a property company, Ascott Asset Management (**AAM**), which contracted itself out to councils.
  10. In September 2021, Mr Hyman started work with Exact Payroll (**the Employer**). AAM was sub-contracted to the Employer.
  11. On 29 October 2021, SMART sent an email to Mr Hyman's AAM business email address to inform him that he had a letter in his SMART pension inbox.
  12. On the same day, Mr Hyman told SMART that he did not want it to automatically enrol him into the Plan and he asked it to remove his details from its database. He also emailed the Employer to confirm the same.
  13. In response, the Employer emailed Mr Hyman to say that it could not stop his automatic enrolment into the Plan and that he would have to follow the automatic enrolment process to opt out.
  14. On 6 November 2021, SMART emailed Mr Hyman to inform him that his Employer had postponed his automatic enrolment until January 2022, so if he did not wish to be in the pension he did not need to do anything at that time. SMART told Mr Hyman that he should, however, note that at the end of the postponement period his Employer was legally obligated to assess his eligibility for the pension again. It said that if he was then eligible for the Plan, he would be automatically enrolled and sent a notification of his enrolment. SMART said that once Mr Hyman was enrolled, he would have one calendar month to opt out of the Plan and no contributions would be due.

15. On the same day, Mr Hyman emailed SMART. He explained that the Employer had told him that he needed to talk to SMART about automatic enrolment into the Plan. Mr N reiterated that he did not want another pension, and he asked it to remove his details.
16. On 1 March 2022, SMART automatically enrolled Mr Hyman into the Plan. On the same day, it emailed Mr Hyman a notice of automatic enrolment at the email address given to it by the Employer (the AAM business email address).
17. On 17 March 2022, Mr first became aware that SMART had automatically enrolled him into the Plan, after seeing deductions on his payslip. SMART refunded the contributions to Mr Hyman via his Employer within the following three weeks.
18. On 6 April 2022, Mr Hyman complained to SMART. He said:-
  - It did not tell him it was acting on behalf of the Employer.
  - It emailed him many times over several months despite him telling them he had a pension and he was not interested in having a new pension.
  - Without his knowledge or consent, it automatically enrolled him into a pension and took contributions from his pay.
  - The Employer had refunded all his contributions, but he wanted an apology, an award of £750 and his data erased.
19. On 20 May 2022, SMART responded to Mr N's complaint. It said:-
  - In order to comply with pension law and regulatory guidance in the matter of record keeping, there was a legal requirement for SMART to retain personal data for the purposes of pension administration. This meant that to demonstrate its compliance with pension laws, SMART was required to retain a record of Mr Hyman's account.
  - It emailed him his notice of automatic enrolment entitled: "You are Being Enrolled" at 12:46 pm on 1 March 2022. Its records showed that someone opened the email at 13:08 pm on the same day. This email confirmed that if Mr Hyman wanted to opt out, he needed to do so within one month of the date of that letter. It then provided a link to a website which had more information about opting out of automatic enrolment.
  - Mr Hyman had received the requisite statutory automatic enrolment notice, and SMART gave him an opt out window. There were strict pension regulations governing the opt out process to ensure it was fair for all workers and SMART had a regulatory duty to abide by the one month opt out window.
  - It provided the Plan, but it was the Employer who was responsible for emailing him, uploading contributions, and paying SMART pension contributions.

- It was a government requirement that employers automatically enrol all eligible employees into a pension scheme and to re-evaluate all employees every three years.
  - It apologised if he was unhappy with SMART's level of service. It had processed his opt out request, refunded his contributions to the Employer and updated his account.
20. On 9 June 2023, Mr Hyman made a complaint to SMART under the Plan's Internal Dispute Resolution Procedure (**IDRP**).
21. On 16 October 2023, SMART sent Mr Hyman its IDRPs response. It did not uphold his complaint.
22. Following the complaint being referred to The Pensions Ombudsman (**TPO**), Mr Hyman and SMART made further submissions that have been summarised below.
23. **Summary of Mr Hyman's position:-**
- The crux of his complaint was that SMART had repeatedly emailed his company, AAM, stating that it was the Employer's pension provider and that it was inviting him to join the Plan.
  - He repeatedly replied to SMART's emails to tell it that AAM was a privately owned company that was not interested in SMART selling it a pension. It ignored his emails, so he then told SMART that he would treat its further emails as spam and ignore them.
  - He had no recollection of SMART's email dated 1 March 2022, but he might have accidentally opened it. Regardless, he did not think it was his legal consent, or acceptance of a pension.
  - SMART should have emailed him at his Redbridge Council email address, or his personal email address. It did not provide him with information to help him understand automatic enrolment or to enable him to make an informed decision about taking a new pension. SMART never sent him any statements showing him what pension contributions his Employer was deducting from his pay.
  - He did not think SMART had behaved professionally nor undertaken the necessary due diligence required to sell him a pension plan. He had been concerned that this was fraud and SMART should now compensate him for its malpractice and the inconvenience it had caused him and delete his personal data from its records.
24. **Summary of SMART's position:-**
- It was authorised to keep records for six years in accordance with its own guidelines and its data retention policy. Consequently, it was unable to remove Mr Hyman's details from its records.

- On 1 March 2022, it emailed Mr Hyman his automatic enrolment notice. It records showed that someone opened the email the same day. The email had information about opting out and it stated Mr Hyman's opt out period dates. The fact that someone opened the email suggested Mr Hyman had received his statutory enrolment notice and he had been made aware of his one month opt out period.
- Once it reviewed Mr Hyman's complaint, SMART processed a refund of £745.36 to the Employer. This was for the contributions paid between 10 January 2022 and 3 April 2022.
- SMART provided Mr Hyman with the correct information concerning automatic enrolment and it had acted in accordance with the rules and regulations set out for Master Trusts.

## Adjudicator's Opinion

25. Mr Hyman's complaint was considered by one of our Adjudicators who concluded that no further action was required by SMART. The Adjudicator's findings are summarised below:-

- The Adjudicator thought the Employer had complied with its legal obligation to automatically enrol Mr Hyman into the Plan. It had previously postponed his enrolment. In the Adjudicator's opinion SMART acted appropriately and it had explained the opt out process to Mr Hyman.
- SMART had followed the correct automatic enrolment procedures. In addition, it had already refunded Mr Hyman's contributions to the Employer who had then passed them onto to Mr Hyman, so he had not suffered a financial loss.
- SMART had apologised to Mr Hyman for his experience in dealing with this matter and any inconvenience it had caused to him. In the Adjudicator's opinion, there was no maladministration by SMART and any inconvenience it caused to Mr Hyman was minimal. TPO's awards for non-financial injustice start from £500 for significant distress and inconvenience. It was the Adjudicator's view, the degree of the non-financial injustice Mr Hyman had suffered was nominal and it did not reach the threshold for the minimum award.
- It was not within TPO's remit to consider data protection issues. The Information Commissioner's Office (**ICO**) adjudicated on such matters. However, in the Adjudicator's opinion, a Master Trust like SMART was legitimately entitled to keep member's details securely for a period of up to six years.

26. Although SMART accepted the Adjudicator's Opinion, Mr Hyman did not accept it, and the complaint was passed to me to consider. Mr Hyman provided further comments as summarised below:-

- He had been self-employed since 2011, and he was not familiar with pensions or the automatic enrolment procedure. He thought SMART had been trying to defraud him.
  - AAM was not interested in starting a pension in any circumstances. He repeatedly told SMART who ignored him and treated him unfairly. SMART took money from his pay without his knowledge and agreement.
  - SMART's pension deductions had caused him a significant amount of distress and inconvenience.
  - He would like TPO to use his full name in its Determination.
27. I will respond to the additional points made by Mr Hyman, but they do not change the outcome, I agree with the Adjudicator's Opinion except in respect of non-financial injustice.

### **Ombudsman's decision**

28. I find that the Employer correctly followed TPR's automatic enrolment guidance. The Employer was under a legal obligation to enrol Mr Hyman into the Plan after it had previously postponed his enrolment.
29. SMART fully explained the opting out process in its email of 6 November 2021 to Mr Hyman. It told him that after his Employer enrolled him in January 2022, he would have one month to opt out. Mr Hyman did not exercise his choice to opt out, so SMART enrolled him into the Plan.
30. Mr Hyman had the opportunity to make his own enquiries about SMART and the automatic enrolment process. He would have seen that SMART was a reputable Master Trust who was acting legitimately and not attempting to defraud him.
31. I do not find that any of SMART's actions amounted to maladministration, so, the complaint is not upheld. Further, Mr Hyman has not suffered any financial loss. SMART refunded his contributions to the Employer who then paid them back to Mr Hyman.
32. SMART has apologised to Mr Hyman for any inconvenience it caused him. I find this to be an acceptable outcome to his complaint as I do find that there has been any maladministration on the part of SMART, therefore they have not caused any financial injustice.
33. A Master Trust such as SMART can keep members' details for a period of up to six years. Mr Hyman should direct any further concerns he might have about data protection to the ICO.

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34. TPO publishes its Determinations on our website. Applicants' names are anonymised in our Determinations because they are in the public domain. However, I am happy to publish Mr Hyman's name as that is his wish.

35. I do not uphold the complaint.

**Anthony Arter CBE**

Deputy Pensions Ombudsman

17 October 2024