

Ombudsman's Determination

Applicant	Mr H
Scheme	Legal & General Worksave Pension Scheme (the Scheme)
Respondent	Kent County Cricket Club (KCCC)

Outcome

1. I do not uphold Mr H's complaint and no further action is required by KCCC.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mr H complains that KCCC has failed to pay contributions to the Scheme for his benefit.

Background information, including submissions from the parties

4. Mr H is a professional Cricketer and joined KCCC in 2012, initially on a one-year contract.
5. On joining KCCC, Mr H became eligible to join the Scheme, which is approved by the English Cricket Board (**ECB**) and is provided and administered by Legal and General.
6. Under the terms of Mr H's contract of employment:-

"The Employer [KCCC] and the Cricketer [Mr H] each undertake to pay an agreed minimum amount towards the Cricketer's pension...

The Employer agrees to contribute 10% of Basic Salary and the Cricketer shall contribute 5%. These contribution rates may not be varied except by agreement between ECB, acting on behalf of the Employer and the PCA [Professional Cricketers Association (**PCA**)], acting on behalf of the Cricketer. The Parties agree that they may contribute a figure in excess of the above agreed minimum amounts but only up to the levels allowed by law and the rules of the pension scheme and that these deductions must be made at source. In the event that the Cricketer does not notify the Employer of the approved pension plan details in any one year of this Agreement then the

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Cricketer shall be deemed to have waived his right to such agreed minimum amounts payable by the Employer towards the Cricketer's pension and the Employer shall not be required to make such payments retrospectively."

7. Mr H's first salary payment was made in April 2012. This included a deduction of £266.67 in respect of his 5% employee contribution. KCCC say that this, and the £666.67 employer contribution, were due to be paid to the Scheme by no later than 19 May 2012. However, on receiving his payslip Mr H queried the deduction in respect of the pension contribution. KCCC say it explained to Mr H that this was the minimum employee contribution required to be eligible to join the Scheme. KCCC also say:-

"After hearing this [Mr H] said that as he had only signed a 1-year contract and the amount going into the pension scheme would be minimal. He envisioned going back to Australia after finishing in England and he would rather not contribute and be part of the pension scheme as a Kent County Cricket Club employee."
8. Mr H received a further payslip in May 2012. This showed that the £266.67 pension contribution from April 2012 had been refunded.
9. In 2013, following an apparently successful season the previous year, Mr H signed a further one-year contract with KCCC. At the time of renegotiating his contract, KCCC say Mr H did not request to become a member of the Scheme; therefore, no pension contributions were taken.
10. In 2014, Mr H was awarded a further contract. He received his first salary payment in respect of the new contract in March 2014. No pension deduction was taken.
11. Mr H queried this and subsequently asked to become a member of the Scheme. Employee and employer contributions were duly directed to the Scheme from April 2014 until 2015, when Mr H's contract was terminated early following a compromise agreement.

Summary of Mr H's position

12. Around November 2017, Mr H contacted KCCC to question his membership of the Scheme saying that documents from Legal and General, "only shows the club [KCCC] making contributions from the 6th of April 2014 when I [Mr H] had been contracted from March 2012."
13. Mr H estimated the shortfall in his pension contributions to be, "between £27k and £32k."
14. In particular Mr H has said:-

"The club [KCCC] has highlighted clause 11 in the contract.

Part of that clause states that the '**contribution rates may not be varied except by agreement between the ECB acting on behalf of the Employer and the PCA acting on behalf of the Cricketer**'. No agreement ever took place by either parties.

This clause, I believe is put in place to protect the player to make an informed decision about his or hers [sic] future...

I believe that the contract was altered without going through the correct avenues given the clause in the contract terms." [Original emphasis].

Summary of KCCC's position

15. On 30 November 2017, KCCC responded to Mr H's concerns saying in summary:-

- On joining KCCC in April 2012, Mr H enrolled into the Scheme as evidenced by his April 2012 payslip. However, Mr H subsequently said that he did not want to join the Scheme. This led to the first contribution being refunded in May 2012.
- Mr H's contract states that he needs to notify KCCC of any changes he wishes to make to the Scheme, otherwise he will be deemed to have waived his right to the minimum pension contributions.
- In 2013, at the time of his contract renegotiation, no mention was made regarding pension contributions. Consequently, he was not admitted to the Scheme in 2013.
- However, in 2014, Mr H notified KCCC that he did want to resume making contributions. Accordingly, employee and employer contributions were paid to the Scheme from April 2014 until 2015, when Mr H negotiated his early release from the contract.
- KCCC added, "Without [Mr H] being willing to contribute we believe we were unable to enrol him on [sic] the scheme as this would potentially have caused issues with other members of the squad as they might have seen this as favourable treatment and going against the contracted requirements."

Adjudicator's Opinion

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

- The terms of Mr H's contract with KCCC require that both he and KCCC must contribute to the Scheme. In order to receive the minimum 10% employer contribution, Mr H is required to contribute 5% of his basic salary.
- However, it is not usually possible for an employer to make membership of a pension scheme mandatory. Any terms in an employment contract to this effect

are likely to be void under Section 160 of the Pension Schemes Act 1993 (**the Act**). Relevant extracts of the Act, referred to by the Adjudicator are provided in the Appendix.

- It is accepted that around April 2012, Mr H queried the employee contribution which had been taken from his salary. Ultimately this led to the contribution being refunded and Mr H effectively opting-out of the Scheme.
- It does not appear to be disputed that Mr H intended to opt-out of the Scheme, and the Adjudicator thought that it was more likely than not that this was Mr H's intention at that time. The Adjudicator took the view that it is not inconceivable that Mr H only intended on playing for KCCC for the duration of his one-year contract, after which he may well have planned on returning to Australia. Consequently, it is plausible (and indeed entirely likely) that he would not have wanted to contribute to the Scheme for such a short amount of time and would, instead, have wanted to opt-out as the evidence suggests.
- Although there is provision within Mr H's employment contract which enables him to vary (including stopping altogether) contributions, the contract is worded in such a way that it could be construed that any variation to the contribution level needs to have the agreement of the ECB on behalf of KCCC and the PCA on behalf of Mr H.
- Mr H's contention is that the agreement which led to him opting-out of active membership of the Scheme was not made between the ECB and the PCA, rather it was an agreement between Mr H and the Finance Director of KCCC. As such, Mr H suggests that the agreement is not enforceable. However, the Adjudicator was not persuaded by the argument Mr H had advanced.
- The Adjudicator said that the effect of Section 160 of the Act is that KCCC was legally obliged to give Mr H the right of opting-out of the Scheme if he asked to do so. But exercising this right should not be contingent on the additional consent or agreement of either the ECB or the PCA. Consequently, if the employment contract sought to fetter Mr H's statutory right to opt-out of active membership of the Scheme, for example by making his opt-out request subject to the further approval of the ECB and the PCA as Mr H has suggested, then this would be invalid and void.
- Further, the Adjudicator did not interpret the relevant terms in the same way that Mr H had suggested. The Adjudicator took the view that the agreement of the ECB and the PCA relates to the contribution rates being lowered below the respective 5% and 10% contribution rates during active membership, rather than the agreement of the ECB and the PCA being mandatory if Mr H wanted to opt-out of the Scheme completely.
- The Adjudicator considered that his reading of the employment contract was supported by the fact that his interpretation would bring the terms of the

employment contract in line with the relevant statutory requirements as set out in Section 160 of the Act. But, even if this conclusion was incorrect and additional consent was required, the Adjudicator considered that in view of Mr H's clear intention to opt-out of the Scheme at that time, the required consent of the ECB and PCA would not have been unreasonably withheld.

- The Adjudicator believed that the dispute turned on whether Mr H opted-out of the Scheme in April 2012, and was satisfied that this was Mr H's intention. If this were not the case, the Adjudicator said he would have expected Mr H to have questioned his membership status in May 2012 on receiving his payslip which showed the refunded pension contribution. Or, failing that, Mr H ought reasonably to have noticed at the very latest in 2014, when he notified KCCC that he wanted to resume making contributions and must, therefore, have known he was not previously an active member.

17. Mr H did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr H provided his further comments, summarised below:-

- He disputes being told that KCCC would not contribute to the Scheme if he did not also make contributions.
- By June 2012, it was clear that KCCC wanted to negotiate a contract for the 2013 season. Further, in 2013, he was 'capped' which demonstrates that KCCC wanted him to play for the club long-term. On this basis, he disputes that he only envisioned playing for KCCC for a year before returning to Australia, saying he had always been thinking about the longer term.
- At the time of the contract negotiations, Mr H and KCCC agreed what he was worth to the club and devised a remuneration package, including pension contributions, based on this. He assumed KCCC had been making pension contributions up to this point under his current contract.
- At no point when the contracts for the 2013 and 2014 seasons were signed, was anything mentioned about opting back into the Scheme. Mr H has said:-

"I believe the club took this chance to save money through these actions... If I was aware the club was not contributing to my pension fund I would have negotiated a higher salary to make up the difference for my agreed value with my contracts over those years."

- Between 2012 and 2015, he asked for a pension statement from KCCC officials on several occasions. But he never received a statement. Mr H has said, "I am not sure why I never received a statement from the club or an answer when I asked for these statements, the only statement I have ever received to date was when I sourced it myself this year to get an updated balance. That's when I realised the balance was less than I expect to see from the statements."

- He disputes that KCCC acted in his best interests and reiterates that his loss is around £14,500, this being, “the shortfall from [KCCC’s] contribution under the contracts that were in place during those years.”

18. Mr H’s comments 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 H for completeness.

Ombudsman’s decision

19. Mr H contends that it was always his intention to play for KCCC in the longer term and that it was clear from the contract negotiations in June 2012, that he would return to play for the 2013 season. However, I am not wholly persuaded by this argument. Mr H opted-out of the Scheme in April 2012, before the contract negotiations had commenced. Thus, at the time of opting-out of the Scheme, there was no guarantee that Mr H’s contract would be renewed.
20. In 2013, a further one-year contract was negotiated. On the one hand, KCCC has said that at that time Mr H did not request to become a member of the Scheme. On the other hand, Mr H claims that KCCC used the negotiations as an opportunity to save money. It is unclear what discussion actually took place. However, the result was that no pension contributions were taken under the 2013 contract.
21. Mr H disputes being informed that KCCC would not contribute to the Scheme if he did not also make contributions. However, I find Mr H’s contract of employment to be unequivocal on this matter. The relevant clause states, “The Employer and the Cricketer *each* undertake to pay an agreed minimum amount towards the Cricketer’s pension” [my emphasis]. In my view, the contract wording makes it clear that KCCC making contributions to the Scheme is dependent on Mr H also contributing.
22. This is further reiterated in the Scheme’s ‘Member’s Booklet’. Section five which deals with the cost of the Scheme confirms, “You are required to pay contributions to secure the Employer’s contributions...” Again, I find that this makes it clear that Mr H cannot opt-out of making contributions to the Scheme whilst also receiving the benefit of contributions made by KCCC on his behalf. Thus, I consider that Mr H ought reasonably to have been aware that he would need to contribute to the Scheme, in order to receive contributions from KCCC.
23. Mr H has suggested that, had he known KCCC was not making contributions to the Scheme, he would have negotiated a more favourable remuneration package to reflect this. However, I do not find that there is any certainty that KCCC would agree to the pay demands Mr H says he would have made. As the outcome of such negotiations cannot be guaranteed, it follows that I am unable to find that there has been a financial loss as a result.
24. Finally, Mr H says that on several occasions between 2012 and 2015, he asked for a pension statement from KCCC and did not receive a response. It is unclear why Mr H did not follow this matter up at the time, since it is evident he was aware there was

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an issue by virtue of not receiving a reply from KCCC. But in any case, this is a new issue which has not previously been raised and so I am unable to consider it as a part of this complaint.

25. Mr H gave a clear instruction to KCCC to cease paying employee contributions to the Scheme, as he is entitled to do under Section 160 of the Act. In doing so, and under the terms of his employment contract and the rules of the Scheme, this also resulted in employer contributions ending. I do not find that KCCC has made an administrative error. Therefore, I do not uphold Mr H's complaint.

Anthony Arter

Pensions Ombudsman
15 October 2018

Appendix

Extract from the Pensions Schemes Act 1993

“160 Terms of contracts of service or schemes restricting choice to be void

(1) Subject to such exceptions as may be prescribed—

(a) any term of a contract of service (whenever made) or any rule of a personal or occupational pension scheme to the effect that an employed earner must be a member—

(i) of a personal or occupational pension scheme,

(ii) of a particular personal or occupational pension scheme, or

(iii) of one or other of a number of particular personal or occupational pension schemes, shall be void; and

(b) any such term or rule to the effect that contributions shall be paid by or in respect of an employed earner—

(i) to a particular personal or occupational pension scheme of which the earner is not a member, or

(ii) to one or other of a number of personal or occupational pension schemes of none of which he is a member, shall be unenforceable for so long as he is not a member of the scheme or any of the schemes.

(2) Subsection (1) shall not be construed so as to have the effect that an employer is required, when he would not otherwise be—

(a) to make contributions to a personal or occupational pension scheme; or

(b) to increase an employed earner's pay in lieu of making contributions to a personal or occupational pension scheme.”