

## Ombudsman's Determination

Applicant	Mrs S
Scheme	Celebrity Global Holdings Ltd Pension Scheme ( <b>the Scheme</b> )
Respondent	Celebrity Global Holdings Ltd ( <b>the Employer</b> )

## Outcome

1. Mrs S' complaint is upheld and to put matters right the Employer shall pay missing contributions totalling £3,020.83, plus interest to her pension plan.

## Complaint summary

2. Mrs S was an employee of the Employer. Her position is that she has a legally binding employment contract which states that the Employer will pay 10% of her salary into a pension arrangement. However, whenever she broached the subject with the Employer, it refused to set up a pension or make any pension contributions.

## Background information, including submissions from the parties

3. The sequence of events is not in dispute, so I have only set out the salient points. I acknowledge there were other exchanges of information between all the parties.
4. The Chairman of the Employer was Dr Al Hadhrami. Mr Goldring of McDermott Will & Emery UK LLP was the personal lawyer and tax adviser who also managed the setting up of the Employer's business in the UK. All of Mrs S' dealings regarding her pension were with either Dr Al Hadhrami or Mr Goldring.
5. Mrs S says that, on 21 November 2018, she entered into a Contract of Employment (**the Contract**) with the Employer. Clause 11 of the Contract stated that the Employer would pay 10% of Mrs S' salary into a private pension scheme of her choice commencing from the start date of the Contract. Clause 8 of the Contract showed Mrs S' total basic salary as being £125,000 per annum, payable in equal monthly instalments in arrears on the 28th of each calendar month.
6. On 26 April 2019, Mrs S emailed Mr Goldring with a number of outstanding issues relating to the general operation of the Employer, one of which was the need to set up a workplace pension. She said that no pension payments had been made for her.

She said that Dr Al Hadhrami had told her to take him to court and that he would not set up a pension arrangement.

7. On 28 April 2019, Mrs S emailed Dr Al Hadhrami setting out the agenda for a telephone conference the following day. The final item on a 14 point agenda was "Company pension – UK pensions regulator".
8. On 1 May 2019, Mrs S emailed Mr Goldring setting out a number of items which indicated that many issues remained with getting the business established.
9. On 3 May 2019, Mrs S again emailed Mr Goldring. She said that Dr Al Hadhrami had all the information required so that a workplace pension could be established. She added that she would opt out of any new scheme and have the contributions paid to her pension plan with St James's Place (**SJP**).
10. Mr Goldring acknowledged receipt of this email, on 6 May 2019, and said that he would report to Dr Al Hadhrami regarding the pension obligations.
11. On 7 May 2019, Mrs S said again that there had been no pension payments to date, but that she had a Direct Debit Request (**DDR**) mandate for SJP which could be set up on the Employer's account once signed. She said that she had given Dr Al Hadhrami the account details so that he could make a manual payment.
12. An email from Mrs S to Mr Goldring, dated 10 May 2019, indicated that some progress had been made. It noted "DDR pension authority for SJP to be set up on [the Employer's] account, agreed it should start from April."
13. However, in an email from Mrs S to Mr Goldring, dated 24 May 2019, it seemed that the hoped for progress had not materialised. She said:

"Pay, tax, pension etc all have to be rectified and I know you are sorting this out. I am to say the least fed up with being paid when Dr Al Hadhrami feels like it..."
14. On 31 May 2019, Mrs S emailed Mr Goldring again. She said:

"Thank you for going over things with Dr Al Hadhrami...I have attached the list of things which I feel need covering off.

...

### 3 Pension

I attach the SJP DDR form for my monthly pension contributions, once signed (sic) I need to return it back to my financial adviser at SJP for them to set up. I have outstanding pension contributions from November-May. Once the forms are returned they should be able to become activated for June but the backdated payments will need to be made manually."

15. On 1 November 2019, Mrs S wrote to Dr Al Hadhrami in response to an email from him dated 19 October 2019. In this letter she set out her various concerns regarding the operations of the Employer. Under the heading of 'Pension' she said:

"I have made you aware that in the UK every company by law has to have a pension scheme in place for its employees. I provided you with the information of a pension lawyer who can do everything on behalf of the company to ensure it avoids action being taken against the company by the pension's regulator. The company does not have a pension scheme in place. My employment contract states that 10% of my salary is to be remitted to a pension scheme of my choice. This has not occurred."

16. In the letter Mrs S also said that she considered the Employer's breaches as constructive dismissal with immediate effect and that her employment was therefore to be treated as terminated. She claimed that she was entitled to damages for breach of contract and the Employer's failure to provide her with six months' notice in writing to which she was entitled under the Contract.
17. At the conclusion of the letter Mrs S set out her calculation of the missing pension contributions based on her salary of £10,416.67 per calendar month and a contribution rate of 10%. Including contributions due on her Payment in Lieu of Notice (**PILON**) the total was £13,541.67.

18. Mrs S says:-

- The Employer employed two people and did not register at all for a company pension scheme.
- The other employee was never paid for her whole time with the Employer, but Mrs S understands that she has not pursued any claim for pension payments or outstanding salary.
- Dr Al Hadhrami refused to set up a payroll or a company pension scheme in the UK.
- She is pursuing this through the courts by way of an Employment Tribunal though the date keeps getting pushed back and is now set for September 2022. The Courts have advised that they are writing to Dr Al Hadhrami and getting no response. The address he gave was a serviced apartment in the UK and he only had the contract with them for a year which has now expired.

19. Mr Goldring has said on behalf of the Employer:-

- The Contract was changed by Mrs S without the Employer's consent. The original contract sent to Mrs S shows the pension provisions at clause 11 are different to those that Mrs S claims. The page number of the signature page is 20.
- The Contract as amended by Mrs S shows the page number of the signature page as 23. However, the signed version of the signature page of the contract shows it is

page number 20. This is evidence that Dr Al Hadhrami and Mrs S signed the original contract sent to her and not the contract under which she asserts her claim.

- Further, it is the Employer's position that Mrs S' employment was terminated by mutual agreement on 30 June 2019 though he accepts further salary payments were made in error.
20. On 19 March 2021, in response to an enquiry from The Pensions Ombudsman (**TPO**), Mr Goldring said that he no longer acted for the Employer.
21. Dr Al Hadhrami has consistently failed to reply to TPO's requests for his response to Mrs S' complaint.

## **Adjudicator's Opinion**

22. Mrs 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 in Paragraphs 23 to 48 below.
23. The evidence showed that Dr Al Hadhrami had attempted to establish a business in the UK and that not only was pension provision not made, but salary was not paid, among a number of other business failings.
24. Under the Pensions Act 2008 (**PA 2008**), every employer in the UK must put certain staff into a workplace pension scheme and contribute towards it. This is called 'automatic enrolment'. If the employer employs at least one person it is classed as an employer and it has certain legal duties (**the employer duties**). The evidence presented indicates that the Employer employed two staff. Therefore, the employer duties applied.
25. The Pension Regulator's (**TPR**) Automatic Enrolment detailed guidance for employers number 6 entitled 'Opting in, joining and contractual enrolment' states:
- “78. Instead of automatically enrolling only eligible jobholders, some employers may choose to:
- immediately enrol all workers into a pension scheme when they first start work with the employer
  - annually re-enrol workers back into the pension scheme if they have ceased membership in the year.
79. To do this, employers must obtain the worker's consent to deduct pension contributions. They often use contractual agreements with their staff (for example the contracts of employment) to obtain this consent. We describe this as contractual enrolment.
80. At the moment, many employers refer to contractual enrolment as automatic enrolment. However, the process that employers must follow for automatic

enrolment is different to that which they will follow for contractual enrolment. The key difference being that under contractual enrolment the employer must get the worker's consent to put them into the pension scheme and make deductions from their salary for the worker contributions. Automatic enrolment does not require the worker's consent to put them into the pension scheme and the regulations require the employer to deduct from salary any contributions payable by the jobholder to the pension scheme.

81. Employers using contractual enrolment must understand the interaction with the employer duties and the action they may still need to take. As a minimum, they will still be required to complete a declaration of compliance with The Pensions Regulator to tell us how they have complied with their duties. The safeguards also continue to apply to the employer. For more information on the safeguards see Detailed guidance no. 1 – Employer duties and defining the workforce.

82. The main consideration for an employer using contractual enrolment is the pension scheme that they choose to use for contractual enrolment. This is because the enrolment duties (described in paragraph 1) and the information requirements do not apply if the worker is an active member of a qualifying scheme. If the pension scheme chosen for contractual enrolment would not meet the criteria to be a qualifying scheme, were it to be used for automatic enrolment, the employer duties will continue to apply in full.”

26. To use contractual enrolment, the employer must obtain the employee's consent to put them into a pension scheme and deduct pension contributions from their salary. This was often done by way of a contract of employment, which the evidence showed had been done in Mrs S' case. Furthermore, contractual enrolment was permitted providing that the employee was a member of a qualifying scheme. Mrs S had such a scheme in place with SJP.
27. The Adjudicator considered that the Employer had failed to honour the contractual terms, which crossed over into employment law. However, the Employer had also failed to meet its duties under PA 2008 and this amounted to maladministration.
28. The evidence provided showed two versions of Mrs S' employment contract – Version 1 with signature page 23 (the version provided by Mrs S) and Version 2 with signature page 20 (the version that the Employer considered to be correct). However, only Version 2 had been signed by both parties.
29. Both versions of the Contract showed that Mrs S was employed rather than self-employed.
30. In Version 2, Section 11 read as follows:

“The Company will comply with the employer pension duties in accordance with Part 1 of the Pensions Act 2008”.
31. The employer duties include meeting a minimum level of contribution rate.

32. There appeared to be no dispute that Mrs S' employment started on 21 November 2018, in accordance with the terms of the Contract. Based on the evidence and regardless of which version of the Contract was the correct one, the Adjudicator's view was that contractual enrolment should have commenced from that date.
33. Mrs S had said in her correspondence that she felt forced to sign Version 2 of the Contract under financial duress. While this may be the case, there was no evidence that Version 1 was ever signed and agreed by either party and therefore in the Adjudicator's view its terms could not be enforced.
34. The evidence was therefore that Version 2 was the only agreed version of the Contract. While Mrs S' signature had not been witnessed, the Employer's signature had been and the Adjudicator concluded that there was reason to believe that it was the intention of both parties that this contract should be enacted.
35. Version 2 of the Contract therefore set out Mrs S' contractual entitlement. However, as asserted by her the Employer has breached the Contract by not setting up a workplace pension scheme.
36. The Contract states that the Employer will comply with its pension duties in accordance with Part 1 of PA 2008. The Adjudicator concluded that this meant that it agreed to meet the minimum level of contribution rate. The minimum contribution rate required by PA 2008 from 6 April 2018 to 5 April 2019 was 5% of the employee's salary, comprising 2% payable by the employer and 3% by the employee. From 6 April 2019 these rates increased to 8% total, comprising 3% payable by the employer and 5% by the employee.
37. Mr Goldring has said that Mrs S' employment was terminated by mutual agreement on 30 June 2019 but has offered no evidence to support this. On the other hand, Mrs S has provided copies of payslips beyond this date. Furthermore, had her employment indeed been terminated in this way, there would have been no reason for Dr Al Hadhrami to have emailed her on 19 October 2019, or for her to respond in a lengthy letter setting out her concerns regarding the Employer's actions. In the Adjudicator's opinion, it was reasonable to assume that Mrs S' leaving date was 1 November 2019.
38. As Mrs S is making a claim against the Employer by way of an Employment Tribunal, the Adjudicator considered that she clearly thought that currently a judgment could be made in her favour and could be enforced, even though the Employment Tribunal had attempted to contact Dr Al Hadhrami without any success.
39. However, the implication of the Employment Tribunal case of *D Rankine v Open Forum Events Limited*, confirms that a claim against an employer in respect of a failure to pay pension contributions does not fall within an Employment Tribunal's jurisdiction.
40. In the case of *Parish v Pensions Ombudsman* [2011] 044 PBLR, the Court decided that section 146(6)(a) of the Pension Schemes Act 1993 (**PSA 1993**), did not prevent

TPO from investigating the claimant's complaint even though he had an ongoing claim at the employment tribunal. The Court decided that TPO's remit was to investigate maladministration in connection with the management of pension schemes, while the tribunal was tasked with deciding whether the claimant's dismissal was unfair which was not a matter that would be the subject of TPO's investigation.

41. s146(a) of PSA1993 states:

“(6) The Pensions Ombudsman shall not investigate or determine a complaint or dispute—

(a) if, before the making of the complaint or the reference of the dispute—

(i) proceedings in respect of the matters which would be the subject of the investigation have been begun in any court or employment tribunal, and

(ii) those proceedings are proceedings which have not been discontinued or which have been discontinued on the basis of a settlement or compromise binding all the persons by or on whose behalf the complaint or reference is made;”

42. In her application to TPO Mrs S said that she had not previously referred her complaint to a tribunal. In view of this declaration, and as there is no evidence to the contrary, there is no reason why I should not consider her complaint.

43. TPO's jurisdiction is limited in respect of Sections 2 to 11 of PA 2008, that refer to employer duties to enrol employees into workplace pension schemes as any contravention does not give rise to a right of action for breach of statutory duty. The legislation also makes it clear that the Pensions Regulator is the only body that can deal with breaches of these sections.

44. However, in Mrs S' case it was clear that she already had a qualifying scheme with SJP in to which the Employer could have made contributions. TPO has the power to direct employers to pay any outstanding contributions into such a scheme.

### **Ombudsman's decision**

45. Mrs S accepted the Adjudicator's Opinion. The Employer did not respond and so the complaint was passed to me to consider. I agree with the Adjudicator's Opinion.

46. Mrs S' complaint is upheld.

### **Directions**

47. Based on a monthly salary figure of £10,416.67, the Employer shall, within 28 days of the date of this Determination:

- pay into Mrs S' pension with SJP 2% of the monthly salary from December 2018 to March 2019 inclusive, that is £833.33 in total; and
  - pay into her pension with SJP 3% of the monthly salary from April 2019 to October 2019 inclusive, that is £2,187.50 in total.
48. In addition, the Employer shall pay into her pension with SJP interest on the above amounts from each monthly due date to the date of payment, such interest to be at the Bank of England base rate applicable at the due date.
49. Mrs S has claimed pension contributions on her PILON but as she appears to have terminated her employment in the letter of 1 November 2019, I do not consider this to be payable.
50. The Pensions Regulator will be notified of the Employer's failure to abide by the Auto Enrolment Regulations.

**Anthony Arter**

Pensions Ombudsman  
10 June 2022