

Ombudsman's Determination

Applicant	Mr Richard Forrest
Scheme	Contract Catering Consultants Limited Staff Retirement and Death Benefit Scheme (the Scheme)
Respondent(s)	Contract Catering Consultants Ltd, (CCCL), in its capacity as Scheme Trustees Mr Harold Trace

Complaint summary

Mr Forrest has complained against the Scheme Trustees and Mr Trace the sole director of CCCL for failing to ensure that contributions were paid over to the Scheme on his behalf.

Summary of the Ombudsman's Determination and reasons

The complaint should be upheld against Mr Trace personally because he was effectively acting as a Scheme administrator and was responsible for the non-payment of contributions on behalf of Mr Forrest to AEGON, the Scheme provider.

Detailed Determination

Material facts

1. According to Companies House, Mr Trace was sole director of CCCL since at least 2007.
2. Mr Forrest made a complaint against CCCL, as his former employer, for unpaid pension contributions to the Scheme which the Ombudsman upheld in September 2011. The amount of the outstanding contributions (including investment return) was £42,798.
3. The Ombudsman, in his determination of September 2011, agreed that the outstanding money should be paid to Mr Forrest's new arrangement with Friends Provident as the Scheme was now closed and unable to accept any further contributions.
4. Mr Forrest has had trouble enforcing the determination. He issued and pursued enforcement proceedings (orders were made for recovery and personal attendance by the county court) and eventually, Mr Trace, offered, on behalf of CCCL, to pay £400 per month. Mr Forrest declined this offer as he says that the full payment could not be guaranteed by CCCL, or paid to him in his lifetime.
5. Mr Forrest subsequently brought a fresh complaint to this Service against Mr Trace in his capacity as Scheme Trustee.
6. Under the declaration of trust signed and dated 1 April 1990, the Scheme Trustee is also the employer CCCL, and not Mr Trace personally.

Summary of Mr Forrest's position

7. The Ombudsman's determination of September 2011, was upheld by the County Court and Mr Trace was ordered to pay the outstanding amount. The fact that the payment has not been forthcoming is solely down to Mr Trace's inability or unwillingness to pay as the funds he admitted he held in reserve (a shortfall of some £20K+ on the total amount due) had been used for other purposes. In addition there was no value in the company in terms of assets to enable him to collect payment through sale of those assets.
8. He has lost a substantial amount of money and the only means of recovery is to claim against Mr Trace.
9. All pension arrangements were made by Mr Trace, he set up and managed everything to do with the pension arrangements and the Scheme. All of his discussions were with Mr Trace when the Scheme was set up and throughout, for example, when they agreed increases in contributions.

10. Mr Trace and CCCL were effectively one in the same. He is the Director of CCCL and as such had a responsibility to ensure his Scheme contributions were dealt with correctly and honestly.

Summary of CCCL's position in its capacity as Scheme Trustees.

11. The day to day tasks of transferring employee contributions into the Scheme was the sole responsibility of CCCL in its capacity as "Employer", and in respect of which a determination by the Ombudsman has already been made.
12. The duties and responsibilities of CCCL in its capacity as "Trustee" do not include transferring employee contributions into the Scheme. Therefore CCCL in its capacity as "Trustee" were not responsible for the failure to pay the Scheme contributions on behalf of Mr Forrest.

Summary of Mr Trace's position in his capacity as Director of CCCL

13. He was not personally responsible for the failure to pay the Scheme contributions on behalf of Mr Forrest. Such responsibilities were exclusively attributable to CCCL in its capacity as "Employer".
14. The fact that an employee of a company physically undertakes various tasks for, and on behalf of a company does not in, law, in the absence of very specific, narrow and defined limited exceptions, denote any liability on the part of such individual in carrying out such acts for and on behalf of a limited company.
15. Any day to day involvement that he had with pensions was solely for, and on behalf of, his employer CCCL in its capacity as employer. Further, he was not a Scheme Trustee.
16. The calculation by AEGON of the total amount of outstanding contributions for Mr Forrest on which the Ombudsman's directions in his determination of September 2011 was based was incorrect.

Conclusions

17. In some circumstances directors of a company can be held to be personally liable (e.g. under statute or more appropriately in this case- where they act in a way which creates a personal obligation).
18. Mr Trace has not disputed that he was solely responsible for the day to day tasks involved in administering the Scheme and specifically in collecting and transferring contributions on behalf of Mr Forrest to AEGON. He says that he had carried out these duties on behalf of the CCCL as Employer. However, I consider that Mr Trace was personally carrying out acts of administration of the Scheme and, therefore, falls within my jurisdiction as an administrator (section 146(4) and (4A) of the Pension Schemes Act 1993 and regulations thereunder). I find that as Mr Trace was carrying

out administrator duties in relation to the Scheme he is personally liable for his actions as a de facto administrator.

19. Mr Forrest has suffered considerable loss and has a right to take reasonable steps to recover his loss. It was plainly maladministration for Mr Trace to make the decision not to pass Scheme contributions on to AEGON. The contributions in question have presumably remained within CCCL, which he controlled. If not, it would appear only he could know where they are. It is my determination that he is personally liable for the loss to Mr Forrest.
20. For the reasons I have given above, I uphold the complaint against Mr Trace personally in his capacity as an administrator of the Scheme.
21. I do not make any finding against CCCL in its capacity as Scheme Trustees. This is because, under the Scheme's declaration of trust the Scheme Trustee is also the employer and Mr Forrest's complaint against CCCL, as the Employer, was previously considered and upheld by my predecessor, and the evidence indicates breaches by both the employer and also the administrator.
22. I note the respondents' comments concerning the validity of AEGON's calculation of the total amount of outstanding contributions specified in the Ombudsman's determination of September 2011. However, the Ombudsman had considered that AEGON's calculations were accurate. Mr Buckley's opinion letter of 20 July 2011, commented that CCCL were claiming the figures should be lower but were having difficulty determining the 'correct' amount. It is clear, therefore, that the parties had adequate opportunity to assess and argue quantum. Once the Ombudsman has issued his determination, under section 151 of the Pension Schemes Act 1993, his statutory function is discharged and he has no power to alter or correct his determination (apart from the power to correct clerical mistakes arising from an accidental slip or omission) or to enforce any direction he may have made.
23. Whilst it is true to say that this is a separate complaint, so quantum could be viewed differently, the submissions put forward in this respect do not constitute sufficient evidence or justification for a finding at a different level. Indeed, they add little to the evidential position on quantum at the time of the September 2011 determination. I also note that neither party disputed it subsequent to that determination, for example, in the County Court enforcement proceedings, judgment was given for the amount the Ombudsman had directed (plus accrued interest), Mr Trace was ordered to attend Court as an officer of the debtor company, the level of quantum was not raised.

Directions

24. **The directions in this determination principally relate to the same sum of money (but against a different party) as in the previous Ombudsman determination of September 2011. Mr Forrest is thus entitled to recover the monies from Mr Trace which remain outstanding from the amount directed in**

that determination, in addition I also direct an award in respect of the distress and inconvenience to which he has been subject.

25. Within 28 days of this determination, Mr Trace is personally to pay to Friends Provident £42,798.12 plus simple interest calculated from 7 September 2011, to the date of payment at the rate for the time quoted by the reference banks;

The details are, Member: R G Forrest, Members Reference: F46022/12768 and the address is: Friends Provident Life & Pensions, PO Box 1550, Milford, Salisbury, SP1 2TW.

26. Mr Trace is also personally to pay Mr Forrest £2,000 to compensate him for the considerable distress and inconvenience caused by his maladministration as identified in my determination. **Payment of this sum will be enforceable together with the sum referred to in paragraph 25 above.**

Anthony Arter

Pensions Ombudsman
19 June 2015