

Ombudsman's Determination

Applicant	Miss E
Scheme	Chivas Brothers Pension Scheme (the Scheme)
Respondent	Chivas Brothers

Outcome

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

Complaint summary

3. Miss E's complaint is that Chivas Brothers has refused to pay the sum of £4,838.29 into the Scheme on her behalf.

Background information, including submissions from the parties

4. The sequence of events is not in dispute, so I have only set out the key points in my Opinion. I acknowledge there were many other exchanges of information between all the parties.
5. Miss E was employed by World Brands Duty Free Limited - trading name Pernod Ricard Travel Retail Europe. She is a deferred member of the Chivas Brothers Pension Scheme (**the Scheme**). The Scheme is a contracted-out contributory arrangement.
6. Chivas Brothers and World Brands Duty Free Limited are part of the Pernod Ricard group of companies.
7. Up to 28 February 2009, while Miss E was on sickness absence, an income protection policy (World Brands PHI) with Unum funded her employee contributions to the Scheme. Premiums for the policy were paid by the Employer as the policyholder.
8. Miss E separately complained to Unum that it had stopped paying the benefits. Unum maintained its position that liability had been accepted for a limited period with full benefits paid up to 28 February 2009.

9. Miss E's employment was terminated on 31 August 2009. A Compromise Agreement (**the Agreement**) between World Brands Duty Free Limited and Miss E was completed in October 2009. As relevant, under 'Contractual Payments', the Agreement stated:-

 "1.2 The Employer will, on the terms of this Agreement, pay the Employee the following:

 1.2.1. Salary and benefits under the Employee's contract of employment accrued up to and including the Termination Date..."
10. Section 8 of Miss E's contract of employment advised that she had the choice of whether or not to join the Scheme.
11. In November 2009 Chivas Brothers provided a letter to Unum stating that Miss E's employment with the Company had been terminated on 31 August 2009 and as such Unum should now correspond directly with her in relation to all matters. Unum replied to Miss E and Chivas Brothers that all correspondence and communication had to be with the policyholder, Chivas Brothers.
12. Miss E subsequently submitted her complaint against Unum to the Financial Ombudsman Service (**FOS**)
13. The Scheme is administered by Mercer. In November 2014 Miss E wrote to Mercer. She said she had noticed that her service end date was 1 March 2009, rather than 31 August 2009, and asked for the date to be corrected.
14. Mercer informed Miss E that 1 March 2009 was the date her income protection benefit had ceased and as she was on nil pay from that date no further contributions had been made to the Scheme on her behalf.
15. Mercer forwarded a further letter from Miss E to Chivas Brothers in which she referred to the Agreement. Chivas Brothers replied to Miss E that it concurred that the Agreement referred to salary and benefits being paid up to 31 August 2009, but as no deduction for her pension had been made from her final pay her Scheme end date remained 1 March 2009. Chivas Brothers said to adjust her pensionable service to 31 August 2009 required her to pay employee contributions of £1,075.18. Chivas Brothers said on receipt of her cheque for this amount it would pay both employee and employer contributions (in total £4,838.29) to the Scheme.
16. In reply Miss E said the Agreement was clear that all employment benefits, which included pension rights, were due up to the date her employment was terminated and that the Agreement was made on the basis that Chivas Brothers would make all and any pension contributions up to and including 31 August 2009.
17. Chivas Brothers replied:-
 - The Agreement did not state that the Employer would make contributions to the Scheme equivalent to employee and employer contributions. Rather it said that

the Employer would pay the employee's salary and benefits under the employee's contract of employment accrued up to and including 31 August 2009.

- In respect of the Scheme the contract of employment gave employees the right to participate in it.
 - Contributions to the Scheme were made by both the Employer and the Employee.
 - As per the Agreement the Employer would make its contribution for the period 1 March to 31 August 2009.
 - As the Employee Miss E would be required to pay £1,075.18 to cover the same period.
18. In August 2010, Unum paid to Chivas Brothers £15,262.92, which included Miss E's employee contributions of £1,086.12 for the period 1 March to 31 August 2009. After deducting basic rate tax and national insurance from the income protection payment Chivas Brothers sent Miss E a cheque for £11,047.53. Chivas Brothers say as Miss E was not in its employment when the payment was received from Unum its cheque to Miss E included the employee contributions of £1,086.12.
19. Chivas Brothers has reiterated its position that it will pay the employer contributions for the period 1 March to 31 August 2009 if Miss E pays the employee contributions for the same period.
20. Chivas Brothers is also of the opinion that Miss E's complaint is not a matter for the Pensions Ombudsman as it cannot be ruled on by the Trustees of the Scheme and is not a dispute regarding the rules of the Scheme. It is a dispute concerning employment benefits during a notice period as defined in the Agreement and as such is a matter of employment law.

Adjudicator's Opinion

21. Miss E's complaint was considered by one of our Adjudicators who concluded that no further action was required by Chivas Brothers. The Adjudicator's findings are summarised briefly below:-
- Miss E's complaint is a matter within the Pensions Ombudsman's jurisdiction to consider as it is a complaint against Chivas Brothers in relation to the Scheme.
 - The Agreement does not state that Chivas Brothers shall cover Miss E's pension contributions from 1 March 2009 to 31 August 2009 and it is under no obligation to do so. The Agreement refers to Miss E's contract of employment, but the latter's reference to the Scheme says no more than that Miss E has the option to join the Scheme.

- The payment that Chivas Brothers received from Unum included an amount for Miss E's employee contributions for the period in question. As the Employer paid the policy's premiums the proceeds from the policy were taxed as income. After deducting tax and national insurance Chivas Brothers refunded the net amount to Miss E, which included an amount for employee pension contribution for the period 1 March to 31 August 2009.
 - The Trustees have agreed to amend Miss E's pensionable service end date to 31 August if contributions are paid to this date. Chivas Brothers has agreed to pay the employer contributions. It is for Ms E to now decide whether she wants to pay the employee contributions.
22. Miss E did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Miss E has provided her further comments which do not change the outcome. I agree with the Adjudicator's Opinion, summarised above, and I will therefore only respond to the key points made by Miss E. for completeness.

Ombudsman's decision

23. Miss E has submitted information that she has requested not be disclosed to Chivas Brothers without her express written permission, pertaining to her settled complaint with Unum. However, as the settlement amount, its breakdown and how it was paid by Unum to Chivas Brothers, and then from Chivas Brothers to Miss E, is known and not disputed (by Miss E and Chivas Brothers) nothing turns on the submitted papers in respect of my consideration of Miss E's complaint against Chivas Brothers.
24. Miss E says:-
- Her complaint relates solely to the pension breaches of the Agreement.
 - Nowhere within the Agreement is there an express provision stating any employee pension payment was to be deducted from the commercially agreed amounts or was to fall due at a future date or event.
 - Chivas Brothers does not dispute that she was an active member of the Scheme to 31 August 2009 and that this is one of the employment benefits specifically referred to in clauses 1.1, 7.2.3 and 7.4.3 of the Agreement.
 - From 1 April 2008 her membership of the Scheme came under the SMART pensions' arrangement, whereby her salary was reduced by an amount equal to the pension contribution she used to make. From that date Chivas Brothers was solely responsible for making contributions to the Scheme in respect of her membership of it. Consequently, £1,075.18 was accounted for in the negotiations leading up to the sums included in the Agreement for payment.

- The settlement with Unum had nothing to do with the Agreement. Her pension contributions for the period in question were not dependent on her making further contributions and/or receiving a payment from Unum.
 - The Trustees have not corrected her employment termination date to 31 August 2009 as directed by Chivas Brothers, who remain in breach of the Agreement and are in addition in breach of pension legislation by not having made agreed contributions into the Scheme since October 2009.
25. Paragraph 7.2.3 of the Agreement says the Employee waives “all other claims...at the time of signing the Agreement excluding, subject to clause 8.3 below, any claim for accrued pension rights”. 7.4 says the Employee accepts the Compensation Payment and Additional Benefits in full and final settlement of ...7.4.3. all other claims...excluding, subject to 8.3 below, any claim for accrued pension rights. Clause 8.3 of the Agreement says “there are no circumstances known to [Miss E] or which ought reasonably to be known to her which might give rise to a claim against the Employer or Associated Employer for personal injury or in respect of accrued pension rights.”
26. The Agreement does not refer to the payment of Miss E’s pension contributions and Chivas Brothers has confirmed that no deduction for pension contributions was made from Miss E’s final pay.
27. It is clear that the payment Chivas Brothers received from Unum included Miss E’s employee contributions for this period and that these were passed to Miss E in the sum refunded to her by Chivas Brothers.
28. I therefore agree with the Adjudicator that Chivas Brothers has no obligation to cover Miss E’s pension contributions for the period 1 March 2009 to 31 August 2009.
29. The Trustees have agreed to amend Miss E’s pensionable service end date to 31 August if contributions are paid to then and Chivas Brothers has agreed to pay its share of this sum. For this to occur it will be necessary for Miss E to pay the employee contributions. It falls to Miss E to decide whether she wants to do that.
30. Therefore, I do not uphold Miss E’s complaint.

Anthony Arter

Pensions Ombudsman
24 May 2017