CENTRE DE DROIT
BANCAIRE ET FINANCIER

Asset management

“Extremely passive” board of trustees liable under civil law

Par Célian Hirsch le 18 October 2024

The members of the board of trustees of a pension fund must draw up the investment strategy and organise and supervise its implementation. If they fail to do so, in particular if they conclude a discretionary mandate without any investment strategy and without supervising the investment manager, the members will incur civil liability (9C_496/2022, 9C_503/2022, 9C_504/2022, 9C_505/2022).

A pension fund for a nursing home in Fribourg decided to enter into a discretionary management contract with an asset management company. The company was owned and managed by the son-in-law of the home’s former director. The foundation’s assets were invested in subfunds of an *umbrella fund* set up in the British Virgin Islands by the son-in-law. In the end, the son-in-law misappropriated the assets, leaving the foundation with an overdraft of more than CHF 57 million.

The Guarantee Fund, within the meaning of art. 56 ff BVG/LPP, granted the foundation CHF 35 million on account of its insolvency. It then filed a partial liability action against the twelve members of the Foundation Board, the auditors and the occupational benefits expert. The Fribourg Cantonal Court upheld the claim and found that all the defendants were jointly and severally liable (608 2019 202). The defendants brought an action before the Federal Supreme Court, contesting in particular their liability.

Under Article 52(1) BVG/LPP, the persons entrusted with the administration or management of the pension fund and the occupational pension experts are liable for any damage they cause to the pension fund intentionally or through negligence. Like the governing bodies of a legal entity (cf. in particular art. 717 of the Swiss Code of Obligations), the governing bodies of a pension fund must exercise due care and diligence in the performance of their duties. After providing an instructive reminder of the scope of the pension fund board’s duty of diligence and loyalty, the Federal Court sets out the specific rules laid down by BVV 2, in particular the principles of security and risk spreading when investing assets. Furthermore, although the Board of Trustees may delegate certain tasks, drawing up the investment strategy and organising and supervising the implementation of the investment strategy are inalienable duties (see art. 51a para. 2 BVG).

In this case, even if the members of the Board of Trustees invoke their status as ‘militiamen’, the diligence expected of them must be examined objectively. However, these members seriously breached their duty of care. They had not drawn up an investment strategy and had entered into a management mandate without any instructions, despite the rules set out in BVV2.

In addition, the investments were made abroad without state supervision and, in particular, created a considerable risk due to a high concentration with a single debtor. In addition, the members of the Board of Trustees did not supervise the manager sufficiently. In fact, they showed ‘extreme passivity’ by relying on the documents provided by the son-in-law and by continuing to work with the asset management company even though they had been informed that 75 % of the foundation’s assets had been invested in sub-funds in the British Virgin Islands, without having a clear view of the nature of the investments. In terms of causation, the offences committed by the son-in-law did not overshadow the failings of the members to such an extent as to interrupt the causal link. Accordingly, the members of the Foundation Board are liable for the damage suffered by the Foundation.

The auditors’ liability is governed by art. 755 of the Swiss Code of Obligations, which applies by analogy by virtue of art. 52 para. 4 of the LPP/BVG. In particular, it must verify whether the assets are managed in accordance with art. 71 BVG/LPP and art. 50 ff BVV2/OPP 2. In the present case, the auditors did not identify as alternative investments the investments made in the sub-fund of the fund set up in the British Virgin Islands. Nor did it inform the Board of Trustees in good time that the investment limits had been exceeded. Had the auditors intervened in time, the investments that were ultimately lost could have been saved. As a result, it is also liable for this ‘total passivity’.

Lastly, the BVG expert must periodically determine whether the pension fund is able to meet its commitments at all times (see art. 52e BVG). However, the BVG expert is not responsible for the assets or the investment of the assets. In this case, the Fribourg Cantonal Court criticised the BVG expert for not having verified the investment strategy and the investment concept to his satisfaction. That said, the BVG expert advised the members of the Board of Trustees against entering into a discretionary management mandate and drew their attention to the need to monitor any future investments. However, it was not his responsibility to monitor the implementation of the new investment strategy decided by the Board of Trustees, nor to supervise the administration of the pension fund’s assets.

The Federal Court therefore dismissed the appeals lodged by the members of the Board of Trustees and the auditors, but upheld the appeal lodged by the BVG expert.

This ruling is a reminder of the responsibility incumbent on the members of the board of trustees of a pension fund, even if they are only militiamen. They must therefore establish an investment strategy and carefully select, instruct and supervise their asset manager (see eg. Bechaalany Sarah/Gabellon Adrien, La responsabilité du conseil de fondation envers l’institution de prévoyance, GesKR 2020 p. 112). As this ruling underlines, the board of trustees would be well advised to be even more cautious when the delegation goes against the advice of the BVG expert. Moreover, it cannot simply rely on the work done by the auditors, as the latter may also be deficient.

Reproduction autorisée avec la référence suivante: Célian Hirsch, “Extremely passive” board of trustees liable under civil law, publié le 18 October 2024 par le Centre de droit bancaire et financier, https://cdbf.ch/en/1378/