

IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO.:PFA/GA/744/99/LS

In the complaint between:

R Kelly

Complainant

and

KPMG Aiken & Peat Provident Fund

First Respondent

KPMG Aiken & Peat (Pty) Ltd

Second Respondent

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT OF 1956

1. This is a complaint lodged with the Pension Funds Adjudicator relating to the complainant's entitlement to the employer's contribution to his pension.
2. No hearings were conducted and I have therefore relied solely on the documentary evidence and the investigation conducted by my investigator, Lisa Shrosbree.
3. The complainant commenced employment with KPMG Aiken & Peat (Pty) Ltd ("the firm") in August 1991 and simultaneously became a member of the KPMG Aiken & Peat Provident Fund ("the fund").
4. In April 1994, the firm sought to recognize the complainant's good performance by granting him certain privileges in the firm. These privileges were akin to those enjoyed by the partners of the firm.
5. Rule 28 reads:

If a member resigns from service in order to become a partner in the Firm he shall be entitled to the full amount standing to the credit of his members contribution and, subject

to the provisions of section 37D, his employers contribution accounts in the books of the Fund plus interest as provided in Rule 26(2).

6. The complainant argues that on being granted the privileges in April 1994, he effectively became a partner of the firm and therefore rule 28 became applicable to him.
7. However on his resignation on 16 May 1997, the fund paid the complainant a benefit of R68 296,15 equal to the amount of his members contribution and a percentage of his employers contribution.
8. The benefit was calculated in terms of rule 31 which states that where a member resigns, he is entitled to a benefit equal to the amount of his member contributions and a percentage of his employer's contributions depending on period of service. The complainant had completed 6 years service at the time he resigned and therefore received 5% of the employer's contributions.
9. The complainant argues that by virtue of him acquiring partnership status in April 1994, he should have received the full amount of the employer contributions in terms of rule 28.
10. The firm however argues that although in April 1994 the complainant was granted certain privileges enjoyed only by the partners of the firm, he never resigned from service in order to become a partner in the firm as required by rule 28, that is, he never officially became a partner of the firm.
11. The crux of this dispute therefore is whether or not the complainant ever became a partner of the firm.
12. The firm bases its assertion that the complainant was never a partner on the fact

that he did not sign any partnership agreement, nor contribute any capital to the partnership nor vote at partners' meetings. In addition, employees who become partners are required to resign from the firm's employ and to withdraw from the fund, neither of which occurred in the complainant's case. In fact the employer continued to make contributions for the period April 1994 and May 1997.

Further, on resignation, the complainant gave the notice period required of employees of the firm and not the 6 month period required of partners. All these factors, according to the firm, confirm that the complainant never officially became a partner.

13. The complainant however states that he was listed as a partner in a number of the firm's international directories, attended partner conferences and meetings, and had divisional strategic and budget responsibilities which are evidence of the fact that he did become a partner of the firm. Further the fact that he remained a member of the fund in this period was due to no fault of his own. In addition, he never signed a partnership agreement because, according to him, the logistics of granting partnership status to employees in the firm was only decided after he had already resigned.
14. A partnership is a legal relationship arising from an agreement between two or more persons each to contribute to an enterprise with the object of making profits and to divide such profits. Therefore a partnership can arise only by agreement between contracting parties. The onus is on the complainant to prove the existence of such an agreement.
15. In the present case, there is insufficient evidence to support a claim that such an agreement was ever concluded between the parties and therefore the probabilities are against the complainant in this regard. His continuation in the fund, his failure to invest capital in the firm, the fact that he did not sign any partnership agreement, nor vote at meetings of partners and that the firm

continued to pay contributions to the fund on his behalf as well as his life assurance premiums all point to his not being a partner. It is also significant that the complainant was not a South African Chartered Accountant yet under the then prevailing rules of The Public Accountants' and Auditors' Board, only South African Chartered Accountants could be partners in the firm and share in the profits.

16. However, even were we to accept that the complainant did become a partner of the firm in April 1994 as he asserts and accordingly became entitled to the full amount of the employers contributions in terms of rule 28, this would not necessarily benefit the complainant financially in any event:

16.1 Firstly, the complainant would be obliged to pay back the firm's contributions to the fund from the date he became a partner to the date of his resignation, that is, April 1994 to April 1997 since a partner is obliged to withdraw from the fund and to provide for his own retirement.

16.2 The complainant would also be liable for additional tax since on becoming a partner, the contributions to his pension, previously tax deductible, should have been included in his taxable income.

16.3 Finally, the complainant would have to refund the group life assurance premiums paid by the firm for the period April 1994 to April 1997 since partners are obliged to bear the cost of their own group life assurance cover.

16.4 Additionally, the claim under rule 28 may have prescribed.

17. However I am satisfied that the complainant received the benefit to which he was entitled in terms of the rules and that he has no further claim.

18. The complaint is accordingly dismissed.

DATED at CAPE TOWN this 25th day of NOVEMBER 1999.

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JOHN MURPHY

PENSION FUNDS ADJUDICATOR