1977
Mar. 2

NICOS G. SERVOS
v.
ATTORNEY-GENERAL OF THE REPUBLIC

[TRIANTAFYLLIDES, P., L. LOIZOU, HADJIANASTASSIOU, JJ.]

NICOS G. SERVOS,

Appellant,

v.

THE ATTORNEY-GENERAL OF THE REPUBLIC,

Respondent.

(*Case Stated No.* 169).

Termination of Employment Law, 1967 (Law No. 24 of 1967)—Proviso to section 5(d) of the Law—Application thereof depends on the judicial evaluation by the Court of the facts of each case—And should not be treated as being necessarily dependent on the existence or not of mala fides *on the part of the employer concerned.*

The appellant was employed as a secondary education schoolmaster, under a series of contracts, on a part-time basis for eight years and on a full-time basis for the last, the ninth, year. When his employment was terminated he filed a claim for compensation with the Industrial Disputes Court under section 3 of the Termination of Employment Law, 1967 (Law 24/67). The tribunal dismissed his claim and hence the present appeal by way of a Case Stated.

What was in issue before the trial court and before the Court of Appeal was whether or not this was a proper case in which to apply the proviso to sub-paragraph (d) of section 5 of the above Law which reads as follows:

"5. Termination of employment for any of the following reasons shall not give rise to a right to compensation:-

.....

(d) where the employment is terminated at the end of a fixed term contract or because of the attainment, by the employee, of the normal age of retirement by virtue of custom, law, collective agreement, contract, works rules or otherwise:

Provided that where the Tribunal considers that any fixed term contract or any series of fixed term contracts should either alone or in conjunction be

considered as a contract of indeterminate duration, then such contract or series of contracts shall be deemed not to be a fixed term contract for the purposes of this sub-paragraph;"

The trial court concluded that such proviso ought not to be applied in favour of the appellant because it had not been established that there existed *mala fides* on the part of the Government, as his employer, in the sense that there had existed no intention on the part of the Government to prevent the appellant, by resorting to the method of appointing him from year to year by means of fixed term contracts, from enjoying any benefit under the relevant provisions of Law 24/67, such as, in the present instance, compensation for the termination of his services.

Held, that the above approach of the trial court involves a wrong application of the law, because the proviso in question is not applicable only when there has been established *mala fides* in the aforesaid sense; that the application of the proviso depends on the judicial evaluation by the Industrial Disputes Court of the facts of each particular case and it should not be treated as being necessarily dependent on the existence or not of *mala fides* on the part of the employer concerned; and that, accordingly, this appeal will be allowed and the case will be remitted, with the opinion of this Court as contained in this judgment, to the Industrial Disputes Court for further consideration by it.

Appeal allowed.

Case Stated.

Case Stated by the Chairman of the Industrial Disputes Court relative to his decision of the 4th December, 1976, in proceedings under section 3 of the Termination of Employment Law, 1967 (Law 24 of 1967) instituted by Nicos G. Servos against the Attorney-General of the Republic, whereby his claim for compensation in respect of the termination of his employment as a secondary education schoolmaster was dismissed.

G. Mitsides, for the appellant.

R. Gavrielides, Counsel of the Republic, for the respondent.

The judgment of the Court was delivered by:-

TRIANTAFYLLIDES, P.: The appellant has appealed, by

way of a Case Stated, against the dismissal by the Industrial Disputes Court of his claim for compensation, under the provisions of section 3 of the Termination of Employment Law, 1967 (Law 24/67), in respect of the termination of his employment as a secondary education schoolmaster.

The trial court found that the appellant was not entitled to compensation because his employment had been terminated at the end of a fixed term contract and that this was not a case where the series of contracts, under which the appellant had been employed on a part-time basis for eight years and on a full-time basis for the last, the ninth, year, could be deemed not to be "a fixed term contract" for the purposes of sub-paragraph (d) of section 5 of Law 24/67, which reads as follows:-

> "5. Termination of employment for any of the following reasons shall not give rise to a right to compensation:-
>
> .....
>
> (d) where the employment is terminated at the end of a fixed term contract or because of the attainment, by the employee, of the normal age of retirement by virtue of custom, law, collective agreement, contract, works rules or otherwise:
>
> Provided that where the Tribunal considers that any fixed term contract or any series of fixed term contracts should either alone or in conjunction be considered as a contract of indeterminate duration, then such contract or series of contracts shall be deemed not to be a fixed term contract for the purposes of this sub-paragraph;"

What has been in issue both before the trial court and before us is whether or not this was a proper case in which to apply the proviso to sub-paragraph (d) of section 5, above.

As it appears from the Case Stated the trial court concluded that such proviso ought not to be applied in favour of the appellant because it had not been established that

there existed *mala fides* on the part of the Government, as his employer, in the sense that there had existed no intention on the part of the Government to prevent the appellant, by resorting to the method of appointing him from year to year by means of fixed term contracts, from enjoying any benefit under the relevant provisions of Law 24/67, such as, in the present instance, compensation for the termination of his services.

We are of the opinion that the above approach of the trial court involves a wrong application of the law, because the proviso in question is not applicable only when there has been established *male fides* in the aforesaid sense. The application of the proviso depends on the judicial evaluation by the Industrial Disputes Court of the facts of each particular case and it should not be treated as being necessarily dependent on the existence or not of *mala fides* on the part of the employer concerned.

We do agree that if *mala fides,* in the sense of attempting to deprive an employee of the benefits under the legislation concerned by appointing him from year to year on fixed term contracts, is found this is a consideration which would lead to the application of the proviso. But, on the other hand, the absence of this factor does not exclude the application of the proviso, as appears to have been thought in the present case by the trial court.

Before we conclude this judgment we have to make two observations:

First, the application of the proviso in question is not, really, a matter of judicial discretion, but it depends on a correct judicial evaluation of the relevant facts.

Secondly, it has been stated on behalf of the appellant, during the proceedings before us, that in his case the procedure of advertising his post and inviting applications each year for a temporary appointment thereto was never followed when his contract was renewed from year to year; on the other hand, the said procedure is referred to, in general terms, in the Case Stated as a matter relevant to the applicability of the proviso: but, no express finding is set out in the Case Stated as to whether or not such a procedure was in fact followed in relation to the appellant; so,

if the Industrial Disputes Court is going to attribute any weight at all to this aspect it should proceed to find out definitely whether the procedure in question was resorted to annually in the case of the appellant.

In the light of the foregoing, we allow this appeal, by way of a Case Stated, and we remit the case, with our opinion as contained in this judgment, to the Industrial Disputes Court for further consideration by it.

The costs of this appeal to be costs in the cause, but, in any event, not against the appellant.

Appeal allowed.
Order for costs as above.