

1978 June 19

[MALACHTOS, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

SAVVAS PETRIDES,

Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH

1. THE DIRECTOR-GENERAL MINISTRY OF EDUCATION,

2. THE DIRECTOR OF THE DEPARTMENT OF PERSONNEL,

Respondents.

(Case No. 84/77).

Public Officers—Holding office in the public service immediately before the date of the coming into operation of the Constitution—Terms and conditions of their service cannot be altered to their disadvantage—Leave (including study leave) included in such terms and conditions—And is regulated by the General Orders in force on the date prior to the coming into force of the Constitution—Circulars issued after such date not applicable—Article 192.1 and 7(b) of the Constitution—General Orders III/2.20(1)(b) and III/2.20(2).

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The applicant immediately before the 16th August, 1960, the date of the coming into operation of the Constitution, held a permanent and pensionable post in the Public Service. In October, 1974, whilst holding the post of Secretary-Inspector of Libraries in the Ministry of Education, he applied and was granted 84 days vacation leave which he had already earned, because he was proceeding for study leave to the United Kingdom. He completed his studies successfully and returned to Cyprus and resumed duties on the 12th July, 1976. After the resumption of duties the respondents decided that the equivalent in money's worth of the one half of the regular leave standing to the credit of the applicant at the time he proceeded to the United Kingdom for studies, should be deducted from his personal emoluments. Hence the present recourse.

The *sub judice* decision was based on Circular No. 376* of the Department of Personnel, dated the 3rd September, 1975 by means of which Circulars Nos. 38** and 61*** were cancelled. Paragraph 2 of Circular 38 repealed the provisions of General Orders III/2.20(1)(b) and III/2.20(2) which read as follows:

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“ III/2.20 (1) When an officer is required to proceed abroad –

(a)

(b) to undertake a course not exceeding three months the whole period of his absence will be recorded as duty and will be leave earning;

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III/2.20 (2) When an officer is required to proceed abroad to undertake a course exceeding three months, the question of how the period of the course will be treated will be decided in each case on its merits”.

Counsel for the applicant contended that since the applicant was immediately before the 16th August, 1960, holding a permanent pensionable post in the civil service, his rights and conditions of service could not, by virtue of the provisions of Article 192.1 of the Constitution, be altered to his disadvantage. Counsel submitted in this connection that by virtue of the provisions of the General Orders the applicant was entitled to earn vacation leave at the rate of 3 1/2 days per month of service and to accumulate this leave up to the maximum of 84 days, and inasmuch as the applicant had already earned this leave on the day he proceeded to the United Kingdom for studies, the respondents were not entitled *ex post facto* to decide as they did, as they were not entitled by virtue of the Circulars to change the conditions of service to his disadvantage.

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Counsel for the respondents conceded the above point and submitted that the *sub judice* decision was based on paragraph (a) of Circular No. 376; and that though General Orders III/2.20.1(b) and III/2.20(2) were cancelled by Circular No. 38, applicant cannot be affected by the provisions of these circulars,

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* Quoted at pp. 208-9 *post*.
** Quoted at pp. 210-11 *post*.
*** Quoted at p. 211 *post*.

which apply only to those persons who were appointed after the coming into force of the Constitution

5 *Held*, that applicant was holding an office in the public service before the coming into operation of the Constitution, and as such, the terms and conditions of his service cannot be altered to his disadvantage (see Article 192.1 of the Constitution); that leave is included in the terms and conditions of service of the applicant (see Article 192.7(b) of the Constitution); and that the provisions of Circular No. 376 of the 3rd September, 10 1975, by virtue of which the decision complained of was taken, as well as the other two previous circulars, Nos. 38 and 61, have no application in the case of the applicant; that the leave of the applicant is regulated by the General Orders in force on the date prior to the 16th August, 1960 (see General Orders 15 III/2.20(1)(b) and III/2.20(2)); and that, accordingly, this recourse will succeed and the decision complained of will be annulled.

Sub judice decision annulled.

Recourse.

20 Recourse against the decision of the respondents to withhold from the personal emoluments of the applicant the equivalent in money's worth of the one half of the vacation leave standing to his credit when he proceeded on study leave to the United Kingdom in October, 1974.

E. Lemonaris, for the applicant.

25 *R. Gavrielides*, Counsel of the Republic, for the respondents.

Cur. adv. vult.

MALACHTOS J. gave the following judgment. The applicant in this recourse applies for the following relief:—

30 A. A declaration of the Court that the act or decision of the respondents to withhold from the personal emoluments of the applicant the equivalent in money's worth of the one half of the vacation leave standing to his credit when he proceeded on study leave to the United Kingdom in October, 1974, is *null and void* and of no effect whatsoever; and

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B. A declaration of the Court that the applicant is entitled to be refunded with sums of money withheld from his personal emoluments as compensation for vacation

leave granted prior to the commencement of his study leave in the United Kingdom.

The facts of the case are as follows:

The applicant immediately before the 16th August, 1960, held a permanent and pensionable post in the Public Service. In October, 1974 he held the post of Secretary-Inspector of Libraries in the Ministry of Education and he applied and was granted 84 days vacation leave which he had already earned, as he was proceeding for study leave to the United Kingdom. The applicant completed his studies successfully and returned to Cyprus and resumed duties on the 12th July, 1976.

After his resumption of duties the respondents decided that the equivalent in money's worth of the one half of the regular leave standing to the credit of the applicant at the time he proceeded to the United Kingdom for studies, should be deducted from his personal emoluments. This decision of the respondents was based on a Circular under No. 376 of the 3rd September, 1975, *exhibit* 3, issued by the Department of Personnel of the Ministry of Finance, which reads as follows:

“ Αδεια απουσίας υπαλλήλων οίτινες μεταβαίνουν εις τὸ ἔξωτερικὸν ἐπὶ ὑποτροφία ἢ ἐκπαιδευτικῆ ἀδείᾳ. 20

Ἐνετάλην ὅπως ἀναφερθῶ εἰς τὰς Ἐγκυκλίους τοῦ Τμήματος τούτου ὑπ' ἀρ. 38 τῆς 29.11.1962 καὶ 61 τῆς 23.10.1965 ἐπὶ τοῦ ὡς ἄνω θέματος καὶ γνωστοποιήσω ὅτι ἀπεφασίσθη ὅπως αἱ πρόνοιαι τῶν ἐν λόγῳ ἐγκυκλίων ἀντικατασταθοῦν ὑπὸ τῶν κάτωθι:— 25

(α) Ἀδεια απουσίας εὐρισκομένη εἰς πίστιν ὑπαλλήλου μεταβαίνοντος εἰς τὸ ἔξωτερικὸν δι' ἐκπαιδευσιν ἐπὶ ὑποτροφία ἢ ἐκπαιδευτικῆ ἀδείᾳ ἀνευ ἀπολαβῶν δὲν ἐπιηρέάζεται, ὑπὸ τὸν ὅρον ὅτι ἡ παραμονή του εἰς τὸ ἔξωτερικὸν δὲν ὑπερβαίνει τὸ ἕν ἔτος· ὡσαύτως ἡ παραμονή του εἰς τὸ ἔξωτερικὸν ὑπερβαίνει τὸ ἕν ἔτος, τὸ ἡμισυ τῆς τοιαύτης ἀδείας διαγράφεται. 30

(β) Ὑπάλληλος πρὸς τὸν ὁποῖον παραχωρεῖται ὑποτροφία, ἢ μεταβαίνει εἰς τὸ ἔξωτερικὸν δι' ἐκπαιδευσιν τῇ ἐγκρίσει τῆς Κυβερνήσεως, θεωρεῖται ὡς εὐρισκόμενος ἐπὶ ἐκπαιδευτικῆ ἀδείᾳ· ἐάν, ἐν τούτοις, ὁ ὑπάλληλος ἔχη εἰς πίστιν του ἀδειαν απουσίας 35

ήτις δὲν διαγράφεται δυνάμει τῆς ὑποπαραγράφου (α) ἀνωτέρω, δύναται, ἐὰν ἐπιθυμῆ νὰ λάβῃ τὴν τοιαύτην ἄδειαν ἔναντι τῆς ἐκπαιδευτικῆς τοῦ ἀδείας. Ἐν τοιαύτῃ περιπτώσει ἡ ἐκπαιδευτικὴ ἄδεια τοῦ ὑπαλλήλου θὰ ἀρχίζῃ ἀπὸ τῆς ἐπομένης ἡμερομηνίας κατὰ τὴν ὁποίαν λήγει ἡ ἄδεια ἀπουσίας αὐτοῦ.

(γ) Εἰς περίπτωσιν ὑποτροφίας διαρκείας πέραν τῶν τριῶν μηνῶν, ὅτε ὁ ὑπάλληλος δικαιούται νὰ λάβῃ πλήρεις ἀπολαβὰς κατὰ τοὺς τρεῖς πρώτους μῆνας τῆς ὑποτροφίας τοῦ δυνάμει τῆς Ἐγκυκλίου Ἄρ. 307 τῆς 5.12.1973 ἢ εἰς πίστιν τοῦ ὑπαλλήλου εὑρισκομένη κατὰ τὴν ἔναρξιν τῆς ὑποτροφίας ἄδεια ἀπουσίας δύναται νὰ χορηγηθῇ εἰς αὐτὸν μετὰ τὴν συμπλήρωσιν τῶν τριῶν πρώτων μηνῶν τῆς ὑποτροφίας κατὰ τοὺς ὁποίους δικαιούται πλήρεις ἀπολαβὰς.

(δ) Ὁ ὑπάλληλος δὲν κερδίζει ἄδειαν κατὰ τὴν διάρκειαν ἐκπαιδευτικῆς ἀδείας μετὰ ἢ ἄνευ ἀπολαβῶν.

Αἱ Ἐγκύκλιοι ἀρ. 38 τῆς 29.11.1962 καὶ 61 τῆς 23.10.1965 διὰ τῆς παρουσίας ἀκυροῦνται.”

(“Vacation leave of officers proceeding abroad on scholarship or on study leave.

I am directed to refer to the Circulars of this Department Nos. 38 dated 29.11.1962 and 61 dated 23.10.1965 on the above subject and to inform you that it has been decided that the provisions of the said circulars be substituted by the following:

(a) Vacation leave standing to the credit of an officer who proceeds abroad for training on a scholarship or on study leave without pay is not affected, provided that his stay abroad does not exceed one year; where his stay abroad exceeds one year, one half of such vacation leave is forfeited.

(b) An officer to whom a scholarship is awarded, or goes abroad for training with the approval of the Government, is regarded as being on study leave; if, however, an officer has vacation leave to his

credit which is not forfeited under sub-paragraph (a) above, he may, if he so desires, take such vacation leave against his study leave. In such a case the officer's study leave will commence on the day following the expiration of his vacation leave. 5

- (c) In case of a scholarship of more than three months' duration, when the officer is entitled to full pay during the first three months of his scholarship by virtue of Circular No. 307 of the 5.12.1973 the vacation leave standing to the credit of the officer at the commencement of the scholarship may be granted to him after the completion of the first three months of the scholarship during which he is entitled to full pay. 10
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- (d) The officer does not gain vacation leave during study leave with or without pay.

2. Circulars Nos. 38 of 29.11.1962 and 61 of 23.10.1965 are hereby cancelled".)

By this Circular, *exhibit* 3, as stated therein, Circulars No. 38 of 29/11/62, *exhibit* 1, and No. 61 of 23/10/65, *exhibit* 2, were cancelled. 20

Circular No. 38 of the 29/11/62 reads as follows:

" I am directed to refer to General Orders III/2.20(1)(b) and III/2.20(2), concerning the period of absence of officers who are required to proceed abroad for the purpose of training, and to inform you that as from the 1st December, 1962, the following rules should be applied: 25

- (a) the vacation leave standing to the credit of an officer who proceeds abroad on a scholarship or other course of training should not be affected, provided that his absence abroad does not exceed one year; where his absence exceeds one year, one half of such vacation leave should be forfeited; 30
- (b) officers awarded scholarships or sent abroad on a course should always be regarded as being on study leave; and 35

(c) study leave with or without pay should not be leave earning.

2. General Orders III/2.20(1)(b) and III/2.20(2) are hereby cancelled."

5 Circular No. 61 of 23/10/65, reads as follows:

"Vacation leave of officers proceeding abroad on scholarships or other courses of training.

I am directed to refer to my circular No. 38 (M.P. 6506/50) of the 29th November, 1962, and to inform you that it has now been decided that rule (b) thereof should be deleted and the following substituted therefor:-

(b) officers awarded scholarships or sent abroad on courses should always be regarded as being on study leave; if, however, an officer has vacation leave to his credit which is not forfeited under para. (a) above, he may, if he so desires, take such vacation leave against his study leave. In such a case the officer's study leave will commence on the day following the expiration of his vacation leave."

By paragraph 2 of the Circular *exhibit 1*, General Orders III/2.20(1)(b) and III/2.20(2) were cancelled. These Orders read as follows:

" III/2.20 (1) When an officer is required to proceed abroad -

(a) to perform a duty; or

(b) to undertake a course not exceeding three months the whole period of his absence will be recorded as duty and will be leave earning;

III/2.20 (2) When an officer is required to proceed abroad to undertake a course exceeding three months, the question of how the period of the course will be treated will be decided in each case on its merits."

By letter dated 6th November, 1976, *exhibit 5*, the applicant applied to the respondents to reconsider their said decision.

On the 11th January, 1977, the applicant received a reply from the respondents, *exhibit 6*, which reads:

"I have been instructed to refer to your letter dated 6th November, 1976, on the subject of your accumulated regular leave standing to your credit in connection with your two years post graduate study leave in the United Kingdom and to inform you, with regret, that in view of the provisions of the relevant circular of the Ministry of Finance No. 376 of 3rd September, 1975, your claim not to withhold from your salary a sum corresponding to the one half of the accumulated regular leave standing at the time of the commencement of your study leave to your credit has not been possible to be approved."

The main ground of law on which this recourse is based, as argued before me by counsel for applicant, is that since the applicant was immediately before the 16th August, 1960, the date of coming into operation of the Constitution, holding a permanent pensionable post in the civil service, his rights and conditions of service cannot by virtue of the provisions of Article 192.1 of the Constitution, be altered to his disadvantage. This Article reads as follows:

"192.1. Save where other provision is made in this Constitution any person who, immediately before the date of the coming into operation of this Constitution, holds an office in the public service shall, after that date, be entitled to the same terms and conditions of service as were applicable to him before that date and those terms and conditions shall not be altered to his disadvantage during his continuance in the public service of the Republic on or after that date."

Counsel for applicant submitted that by virtue of the provisions of the General Orders the applicant is entitled to earn vacation leave at the rate of 3 1/2 days per month of service and to accumulate this leave up to the maximum of 84 days, and inasmuch as the applicant had already earned this leave on the day he proceeded to the United Kingdom for studies the respondents were not entitled *ex post facto* to decide the withholding from his personal emoluments the equivalent in money's worth in respect of such leave, as they were not entitled

by virtue of the circulars to change the conditions of service to his disadvantage.

In conceding the above point counsel for the Republic submitted that the decision of the respondents was based on paragraph (a) of Circular No. 376 of 3rd September, 1975, *exhibit 3*, which is a translation into Greek of paragraph (a) of Circular No. 38 of 29/11/62, *exhibit 1*. By paragraph 2 of *exhibit 1* General Orders III/2.20(1)(b) and III/2.20(2) were cancelled, but as the applicant was holding an office in the Public Service prior to the 16/8/60, cannot be affected by the provisions of the circulars which apply only to those persons who were appointed after the coming into force of our Constitution.

I must say from the outset that counsel for the respondents very rightly and fairly conceded the above point and agreed with the view taken by counsel for applicant.

It is not in dispute that the applicant was before the coming into operation of the Constitution the holder of an office in the Public Service, and as such, according to Article 192.1, the terms and conditions of his service could not be altered to his disadvantage. Leave is included in the terms and conditions of service of the applicant by virtue of Article 192.7(b), which provides that terms and conditions of service means, subject to the necessary adaptations under the provisions of this Constitution, remuneration, leave, removal from service, retirement pensions, gratuities or other like benefits. So, the provisions of Circular No. 376 of the 3rd September, 1975, *exhibit 3*, by virtue of which the decision complained of was taken, as well as the two previous circulars, *exhibits 1* and *2*, which were cancelled by *exhibit 3*, have no application in the case of the applicant.

The leave of the applicant is regulated by the General Orders in force on the date prior to the 16th August, 1960, under which the applicant was not only entitled to full pay of his earned leave on the date he proceeded for studies to the United Kingdom, but also under General Orders III/2.20(1)(b) and III/2.20(2), if the course did not exceed three months the whole period of his absence would be recorded as duty and would be leave earning. If, however, the course exceeded three months, as in the case of the applicant, the question of how the period

of the course would be treated would be decided on the merits of the case.

For the reasons stated above this recourse succeeds and the decision complained of is hereby annulled.

On the question of costs, the respondents are ordered to pay 5
to the applicant £25.- against his costs.

*Sub judice decision annulled.
Order for costs as above.*