

1980 November 29

[A. LOIZOU, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

EMILIOS CHRISTODOULOU,

Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH THE
DIRECTOR OF THE DEPARTMENT OF PERSONNEL,

Respondent.

(Case No. 229/79).

-
- 5 *Public Officers*—“*Public Service*”—Section 2 of the *Public Service Law, 1967 (Law 33/67)* and Article 122 of the Constitution—*Service in the Armed or Security Forces in the Republic*—Not *Public Service* within the meaning of the above provisions—*Service in the National Guard by virtue of a call and summons under section 10 of the National Guard Laws, 1964–1977*—Is *service in the Armed or Security Forces of the Republic*—And not *public service* coming within the ambit of the *Casual Public Officers (Appointment to Public Offices) Law, 1979 (Law 35/79)*.
- 10 *Casual Public Officers (Appointment to Public Offices) Law, 1979 (Law 35/79)*—“*Casual Officer*” in section 2 of the Law—*Service in the National Guard by virtue of a call and summons under section 10 of the National Guard Laws, 1964–1977*—Not *public service* coming within the ambit of the above Law—Section 2
- 15 of the *Public Service Law, 1967* (definition of “*Public Service*”) and Article 122 of the Constitution.
- 20 *National Guard*—*Service in National Guard by virtue of a call and summons under section 10 of the National Guard Laws, 1964–1977*—Not *public service* coming within the ambit of the *Casual Public Officers (Appointment to Public Offices) Law, 1979 (Law 35/79)*.

The applicant, a registered dentist, has since 1968 been serving in the National Guard as a dentist pursuant to repeated personal

calls and summonses by the Minister of the Interior after a decision of the Council of Ministers under section 10* of the National Guard Law, 1964 (Law 20/1964 as amended). Initially he held the rank of second lieutenant but since 1973 he has been conferred the rank of a captain. His duties included the usual duties of a dentist of the National Guard and such additional duties that could be assigned to him by the Commander of the National Guard. He was paid remuneration for his services as a dentist and the exercise of his profession privately was permitted in such a manner as not to interfere with the execution of his duties in the National Guard.

Following the enactment of the Casual Public Officers (Appointment to Public Offices) Law, 1979 (Law 35/79), which was enacted for the purpose of rendering possible, in deviation of the provisions of the Public Service Law, 1967 (Law 33/67), the appointment to an appropriate post in the Public Service under Law 33/1967 of all the officers who were serving in the Public Service for a number of years either on contract or on daily wages basis or on a casual** basis, the applicant applied to the respondent and asked to be included in the list, which the respondent would forward to the Public Service Commission, for appointment to the post of dentist in accordance with section 3 of the said Law 35/79. In reply the respondent informed the applicant that "given that he serves in the National Guard by virtue of a call in accordance with section 10 of the National Guard Laws 1964-1977, he cannot be included in the said lists"; and that he "as well as the other doctors serve in the National Guard by virtue of a call to serve for a fixed period and concurrently are entitled to practise their profession privately". Hence this recourse.

Held, that the definition*** of "public service" in section 2 of the Public Service Law, 1967 (Law 33/1967), though somewhat different from the one to be found in Article 122, has one thing in common with the definition in Article 122 because

* Quoted at p. 622 *post*.

** "Casual Officer" is defined by section 2 of Law 35/79 as follows:
 "2(1) 'Casual Officer' means officer serving in the Public Service without appointment either on contract or on daily wages basis and 'casual basis' shall be construed accordingly".

*** Quoted at p. 628 *post*.

in both definitions "public service" excludes service in the Armed Forces or the Security Forces of the Republic (the National Guard did not exist at the time of the drafting of the Constitution); that, therefore, applicant was not a "casual officer",
 5 since such officer is the one who serves in the public service which in accordance with the above definition means service under the Republic other than service in the Armed or Security Forces of the Republic and there can be no doubt that the National Guard forms part of such Armed or Security Forces;
 10 accordingly the recourse must fail.

Held, further, that the legal nature of the summonses cannot be excluded; that they are clearly stated to be summonses for call by name for service in the National Guard issued by the Minister of Interior by virtue of the authority given to him
 15 by section 10 of the National Guard Law, as amended, and the relevant decisions for the purpose, of the Council of Ministers; that the service of such a summons entails legal obligations that were not intended to be those undertaken by a person entering the civil service in any capacity; that the fact that
 20 before those doctors were called up under section 10 their willingness to do so was ascertained, does not change the nature of the obligations imposed on them by the service of a summons under section 10 nor does it change the character of their service which is nothing else but service in the National Guard and
 25 as such not service in the public service.

Application dismissed.

Recourse.

Recourse against the decision of the respondent not to include applicant's name in the list forwarded to the Public Service
 30 Commission pursuant to the provisions of section 3 of the Casual Public Officers (Appointment to Public Offices) Law, 1979 (Law No. 35 of 1979).

E. Lemonaris, for the applicant.

S. Matsas, for the respondent.

35

Cur. adv. vult.

A. LOIZOU J. read the following judgment. By the present recourse the applicant claims that the decision of the respondent not to include his name in the list forwarded to the Public Service Commission pursuant to the provisions of section 3

of the Casual Public Officers (Appointment to Public Offices) Law, 1979 (Law No. 35 of 1979) is null and void and of no effect whatsoever.

The applicant is a registered dentist and has been continuously serving in the National Guard since the 30th January, 1968, when he was first called up by name by the Minister of the Interior following a decision of the Council of Ministers under section 10 of the National Guard Law 1964 (Law No. 20 of 1964) as amended. Section 10 of the law as amended by s. 8(a) of Law 26 of 1965, s. 4(a), 4(b), and 4(c) of Law No. 16 of 1977, in so far as relevant to this case, reads as follows:

- “(1) All persons of special education, qualifications or experience considered to be necessary to the Force may, in exceptional circumstances or where this is necessary for the formation and functioning of specific services of the Force, be called out by name by the Minister following a decision of the Council of Ministers irrespective of age limit and class, physical fitness or rank, so long as the condition of their health so allows. 15
- (2) The calling out shall be made for service for a period fixed by the Council of Ministers and in any event not exceeding 26 months. This service may, during this period, be on a whole time or part-time engagement, as may be prescribed in the decision: 20
- Provided that _____ 25
- Provided further that in the case of service-men the period of service under this section shall be counted against the period of military service.
- (3) To the persons referred to above, there shall be conferred the rank of Auxiliary Officer which they shall retain only during the period of their service in the Force and which is appropriate to their standing and qualifications. 30
- (4) As soon as the circumstances which led to the calling out cease to exist, persons so called out shall be discharged by the Minister following a decision of the Council of Ministers”. 35

By Decision No. 5506 dated 24.3.66 the Council of Ministers decided as follows:

- 5 “ (a) to approve the calling by name for part-time engagement of 13 doctors and 3 dentists for a period of one year in consideration of a monthly salary of £50.— for the doctors and £30.— for the dentists, with the rank of Second Lieutenant under the terms which are set out in Appendix 4 of the Submission which must be amended appropriately by the Ministers of Interior and Health in consultation with the Attorney-General of the Republic.
- 10
- (b) to authorise the Ministry of Health to communicate the terms of service to the Medical Associations and invite those interested to submit applications for service.
- 15
- (c) to authorise the Ministers of Health and Interior to choose the most suitable doctors and dentists out of those who offered themselves for service.
- (d) to authorise the Minister of Interior to proceed to call up those so selected doctors and dentists by calling them by name by virtue of Section 10 of the National Guard Laws 1964–1966 and to issue a ‘Decision of Calling by Name’ on the basis of Appendix 3 to the Submission.
- 20
- (e) that the posting of each of those doctors and dentists so called, be made taking into consideration their places of ordinary residence, and
- 25
- (f) to authorise the Minister of Finance to find the necessary funds”.

30 This decision of the Council of Ministers was followed apparently by similar ones as the first summons by which the applicant was called by name (*exhibit 1*) refers to a decision of the Council of Ministers under No. 7214 and dated 18.11.1967; and the last summons for the purpose (*exhibit 2*) covering the period 1st January, 1978 to 31st December, 1979, speaks of the Minister of Interior exercising the powers vested in him under section 10 of the National Guard Laws 1964–1977 and the decision for the purpose of the Council of Ministers No. 16.373 and

35

dated 24th November, 1977. It appears that there is a further summons for the years 1980–1981. The text of these summonses is in all material respects the same, except that as from the issuing of *exhibit 2* the remuneration of £134.—per month was to be increased by 5% as from the 1st March, 1978, and by another 5% as from the 1st July, 1978, plus £10.—per month travelling expenses; since then, cost of living allowance at the rate payable to civil servants has also been given to him in addition to his monthly remuneration. 5

The rank of Second Lieutenant was initially conferred on the applicant, but since 1973 he has been conferred the rank of a Captain. The duties of the applicant as appearing in *exhibit 2* are stated to be as follows: 10

“The duties of the called up person will include the usual duties of a dentist of the National Guard and such additional duties that may be assigned to the called up person by the Commander of the National Guard or his representative. The place at which the called up person shall serve, shall be as far as possible the nearest to his place of ordinary residence. 15 20

The called up person will render his services on continuous engagement in accordance with the instructions from time to time of the Commander of the National Guard or his representative and shall be always in readiness and in contact with his Unit in accordance with the instructions of the said Commander or his representative. 25

The exercise by the called up persons of his profession privately shall be permitted in such a manner as not to interfere with the execution of his duties in accordance with the present terms”. 30

With regard to leave, it is provided that “during the year of service a called up person is entitled to ordinary and sick leave with full remuneration up to a total of 15 days respectively”.

Under the heading “Various”, it is stated: “The called up person will be subject to all the relevant provisions of the National Guard Law and the Military Criminal Code and the relevant Laws and Regulations. 35

- In case of omission of the called up person to perform any of his duties as provided by the present terms, or negligent execution by him of the said duties, or his non-compliance to the aforesaid instructions of the Commander of the National
- 5 Guard or his representative, or in case of breach by the called up person of any other term of the present terms of service, the Minister of Interior on behalf of the Government of the Republic may, by written notice, terminate immediately the service of the called up person when the service of the called
- 10 up person by virtue of the present terms will be considered as at an end and no amount for remuneration will be payable to him as from the date of such termination and the called up person will be entitled to any compensation with regard to the said termination”.
- 15 These summonses of Call Up by Name (*exhibits 1 & 2*) are signed by the Minister of Interior in office at the time of their execution.

The Casual Public Officers (Appointment to Public Offices) Law, 1979 consists of a preamble and in effect two sections, section 2, the definition section, and section 3, its substantive part. Its preamble reads:

20

“Whereas there is a great number of Officers serving for five and more years on a casual basis, either on contract or on daily wages, and as on account of the existing condi-

25 tion their appointment to public offices in accordance with the existing legislation could not be effected until to-day,

And whereas from the circumstances it becomes indispensable for the regular and unhindered function of the Public Service, the collective appointment of these officers in

30 diviation of the existing provisions.

The House of Representatives enacts as follows:

In this law, unless the contents otherwise requires:

-
- 35 2(1) ‘Casual Officer’ means officer serving in the Public Service without appointment either on contract or on daily wages basis and ‘casual basis’ shall be construed accordingly. ‘Officer’ means one serving

before the 1st April, 1978, continuously and without interruption for five years in the Public Service on casual basis.

- (2) Terms not otherwise defined in this law have the meaning assigned to such terms by the Public Service Law 1967". 5

Section 3 reads as follows:

- "(1) In a deviation of the provisions of the Public Service Law, 1967, or any other Law referring to the Public Service, every officer who is in the service on the date of enactment of this Law or who has retired between the 1st April, 1978, and the date of its enactment, is appointed by the Public Service Commission to an appropriate post in the Public Service from the 1st April, 1978, according to the provisions of the Public Service Law, 1967, but subject to the provisions of sub-section 2 and according to the list prepared and forwarded to the Public Service Commission by the Director of the Department of Personnel. 10 15
- (2) Without prejudice to the generality of the provisions of sub-section 1 the allotment of a post thereunder is effected notwithstanding that the officer does not possess the qualifications provided by the schemes of service of the post allotted to him". 20

A few days after the enactment of this law, the applicant, through his advocates, applied by letter dated the 30th April, 1979 (*exhibit 3*) to the Director of the Department of Personnel, to have himself included in the lists which the said Director would forward to the Public Service Commission for appointment to the post of dentist in accordance with the provisions of section 3 of the aforesaid law. It was stated therein also that the applicant served continuously on contract as a dentist in the National Guard with the rank of Captain as from the 26th April, 1967. The reply of the respondent dated the 8th May, 1979 (*exhibit 4*), after referring to the contents of the applicant's letter is as follows: 25 30 35

"_____ given that he serves in the National Guard by virtue of a call in accordance with Section 10 of the National Guard Laws 1964-1977, he cannot be

included in the said lists. He, as well as the other doctors serve in the National Guard by virtue of a Call to serve for a fixed period and concurrently are entitled to practise their profession privately”.

5 Upon receipt of this reply which is the communication of the subject decision, the present recourse was filed.

Of the four grounds of law set out in the application, counsel has argued only the first three and abandoned the fourth one. These three grounds are the following:

10 “1. Respondents’ decision is contrary to Law, i.e. section 3 of Law 35 of 1979.

2. According to the provisions of Section 3 of Law of 1979 and on the basis of the facts set out in the recourse, the respondents do not have a discretion in the matter and therefore their decision not to include Applicant’s name in the list of persons which would be forwarded to the Public Service Commission is contrary to Law and in abuse of powers.

15
20 3. On the basis of the facts set out in the recourse, respondents’ decision is not duly reasoned and/or the reasoning behind same is wrong in Law and/or defective”.

With regard to the latter ground, suffice it to say that in the circumstances the *sub judice* decision is duly reasoned and I need not deal with it any further.

25 In support of the first two grounds which were argued together, counsel for the applicant has urged that his client has been engaged for service in the National Guard by virtue of a contract of employment as *exhibits* 1 and 2 are and which contain the terms of such employment; being a dentist he belongs to the Ministry of Health which controls medical services, although the posting and the services he renders is another matter. It was argued that the applicant was serving in the civil service on a contract basis continuously and without interruption for more than five years and in fact he served so since 1967.

30
35 In these circumstances, counsel for the applicant said, his case comes within the provisions of Section 3 of Law 35 of 1979 which was enacted to regulate the problem of casual employees whose prolonged service merited a just solution.

On the other hand, counsel for the respondents has argued that *exhibits* 1 and 2 are not contracts of employment in the civil service but are summonses for service in the National Guard issued by the Minister under section 10 of Law No. 20 of 1964, as amended. 5

In my view, from the definition of the term “casual officer” in subsection 1 of section 2, it clearly appears that it is relevant to the determination of the question posed in this recourse, an examination of the meaning of the term “public service” which is not defined in this law but by virtue of the provisions of subsection 2 of the said section it must be given the meaning assigned to it by the Public Service Law 1967. 10

Under section 2 of this latter law:

“ ‘Public service’ means any service under the Republic other than the judicial service of the Republic or service in the Armed or Security Forces of the Republic or service in the office of Attorney-General of the Republic or Auditor-General or Accountant-General or their Deputies or service in any office in respect of which other provision is made by law or service by person whose remuneration is calculated on a daily basis”. 15 20

This definition, though somewhat different from the one to be found in Article 122 of the Constitution, it has one thing in common, that in both definitions “public service” excludes service in the Army—as the National Guard did not exist at the time of the drafting of the Constitution—the Armed Forces or the Security Forces of the Republic. 25

A “casual officer”, therefore, is the officer who serves in the public service which in accordance with the definition just set out, means service under the Republic other than service in the Armed or Security Forces of the Republic and there can be no doubt that the National Guard forms part of such Armed or Security Forces. 30

Furthermore, the legal nature of *exhibits* 1 and 2 cannot be disregarded. They are clearly stated to be summonses for Call by Name for service in the National Guard issued by the Minister by virtue of the authority given to him by section 10 of the National Guard Law, as amended, and the relevant 55

decisions for the purpose, of the Council of Ministers. The service of such a summons entails legal obligations that were not intended to be those undertaken by a person entering the civil service in any capacity. The fact that before those doctors
5 were called up under section 10 their willingness to do so was ascertained, does not change the nature of the obligations imposed on them by the service of a summons under section 10 nor does it change the character of their service which is nothing else but service in the National Guard and as such not
10 service in the public service.

For all the above reasons this recourse fails and is hereby dismissed with no order as to costs.

Application dismissed. No order as to costs.