1986 June 21

[TRIANTAFYLLIDES, P.]

IN THE MATTER OF ARTICLE 146
OF THE CONSTITUTION

CHARITINI SCOUFARI,

Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH
1. THE MINISTER OF LABOUR AND SOCIAL INSURANCE,
2. THE DIRECTOR OF THE DEPARTMENT OF SOCIAL WELFARE SERVICES,

Respondents.

(Case No. 213/81).

Administrative act—Purpose of—Doubt as to whether such purpose is of a disciplinary nature—Doubt should be resolved by treating it as being of such a nature—In such a case failure to afford the applicant an opportunity of being heard constitutes a violation of the rules of natural justice.

The applicant was appointed on probation to the post of Superintendent of Hostels as from 1.1.73. She was informed that her future incremental date would be the 1st July, starting as from 1.7.74.

As the six monthly reports on the applicant were not satisfactory, the Public Service Commission informed her about its intention to terminate her appointment, but, at the end, and after hearing the applicant, decided to extend the probationary period for another two years. Nothing was said about applicant's increments. The applicant's permanent appointment was, eventually, made on 6.3.78. In the meantime the annual increments for the years 1974 and 1975 were not paid to the applicant.

The applicant applied for the payment of such increments. Her application as regards the increment of 1974 was turned down. Hence the present recourse.

Held, annulling the sub judice decision: (1) If there is a doubt as to whether or not the essential and predominant purpose of a sub judice decision is of a disciplinary

nature, such doubt should be resolved by treating it as a disciplinary one.

(2) In the light of the material before the Court, there exists in this case such a doubt and, therefore, the sub judice decision is of a disciplinary nature and the applicant ought to have been given the opportunity of being heard.

(3) The failure to afford the applicant such an opportunity constitutes a violation of the rules of natural justice

Sub judice decision annulled.
No order as to costs.

Cases referred to:

Kalisperas v. *The Republic*, 3 R.S.C.C. 145;

Pantelidou v. *The Republic*, 4 R.S.C.C. 100;

Rallis v. *The Republic*, 5 R.S.C.C. 11.

Recourse.

Recourse against the decision of the respondent whereby it was decided that the applicant was not entitled to retrospective payment of her annual increment in respect of the year 1974.

A. S. Angelides with *M. Pierides*, for the applicant.

R. Gavrielides, Senior Counsel of the Republic, for the respondents.

Cur. adv. vult.

TRIANTAFYLLIDES P. read the following judgment. By means of the present recourse the applicant is, in effect, challenging the decision of the Director of the Department of Welfare Services which was communicated to her on the 6th April 1981 and by means of which it was decided that she was not entitled to retrospective payment of her annual increment in respect of the year 1974.

The applicant was first appointed to the temporary post of Superintendent of Hostels in 1969. The said post became permanent in 1973 and on the 27th September 1973 there was offered to the applicant retrospective appointment on probation to the said post as from the 1st January 1973, which she accepted. She was, also, informed then that her future incremental date would be the 1st July, starting as from the 1st July 1974.

It appears that during the two years' probationary period the six monthly reports submitted by the Head of the Department of Welfare Services in respect of the work of the applicant were not satisfactory and the Public Service Commission informed her, on the 20th June 1975, about its intention to terminate for this reason her appointment on probation.

Before, however, the termination of her appointment on probation the Public Service Commission heard the applicant on the 17th October 1975; and, having taken into account all relevant considerations, decided to extend the probationary period of the applicant for another two years, until the 31st December 1976, in order to afford her the opportunity to prove her suitability for permanent appointment.

In the meantime there were not paid to the applicant her annual increments of salary for the years 1974 and 1975.

Then, for reasons for which the applicant was not to blame, the probationary period of the applicant had to be extended once again up to the 31st December 1977 and she was informed accordingly on the 15th June 1977.

The applicant's appointment to the post concerned was, eventually, confirmed on the 6th March 1978.

On the 19th September 1978 she addressed a letter to her Head of Department asking for the settlement of the matter of the non-payment to her of the increments of her salary for the years 1974 and 1975.

On the 6th April 1981 the applicant was informed that in the light of legal advice given by the Deputy Attorney-General, on the 9th October 1979, it was not possible to grant to her retrospectively her increment for 1974, but there would be paid to her the increment for 1975.

One of the main arguments which was put forward by counsel for the applicant was that the withholding of her increment for 1974 amounts to a disciplinary punishment which was imposed on her without affording her the opportunity to be heard and that this was contrary to the rules of natural justice.

I have perused the relevant documents which are con-

tained in the personal file of the applicant but, neither from such documents nor from the material which was placed before the Court during the hearing of the case, there can be deduced with certainty how it was reached, by the competent administrative organ, the final decision not to pay to the applicant her increment for the year 1974.

It is to be noted that the consideration in 1975 by the Public Service Commission of the case of the applicant was confined to the matter of the termination or prolongation of her probationary period and nothing was said about the withholding of her annual increments for 1974 and 1975.

From documents in her personal file emanating from officials in the Welfare Services Department who, at various stages, have dealt with the matter in question it appears that they have taken the stand that since no disciplinary proceedings were ever instituted against the applicant no sanction such as the withholding of her increments could be imposed on her.

It has been judicially accepted in cases such as *Kalisperas* v. *The Republic*, 3 R.S.C.C. 146, 151, *Pantelidou* v. *The Republic*, 4 R.S.C.C. 100, 106 and *Rallis* v. *The Republic*, 5 R.S.C.C. 11, 17, that if there is a doubt as to whether or not the essential and predominant purpose of a sub judice decision is of a disciplinary nature such doubt ought to be resolved by treating the said decision as a disciplinary one.

As in the particular circumstances of the present case I have, indeed, been left with considerable doubt as to whether or not the withholding of the increment of the applicant for 1974 is of a disciplinary nature, I have reached the conclusion that the applicant ought to have been given the opportunity to be heard in this respect and that the failure to afford her such an opportunity constitutes a violation of the rules of natural justice with the result that the relevant administrative action has to be annulled for this reason.

In the result the present recourse succeeds; but I shall not make any order as to its costs.

Sub judice decision annulled.
No order as to costs.