[TRIANTAFYLLIDES, STAVRINIDES & LOIZOU JJ.]

ANDREAS P. LOIZOU,

*Appellant-Defendant,*

*v.*

NICOS TH. POULLIS,

*Respondent-Plaintiff,*

(*Civil Appeal No.* 4626).

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*National Guard—The National Guard Law,* 1964 (*Law* 20/64), *as amended by section* 4 *of the National Guard (Amendment) Law,* 1966 (*Law* 5/66), *section* 24(1) *and* (2)*—Contract of service—Contract of service not terminated but only suspended on account of the enlistment of the employee in the National Guard—Section* 24(1)*—Duty of the employer to re-employ the ex-conscript on his discharge from military service in the same or similar employment as before his enlistment—Or, in default, to pay to the ex-conscript the appropriate salary, in the present case six months salary—No remedy specifically provided in the case of such default—Maxim "ubi jus ibi remedium" applicable—Therefore in case of such default an action lies—Nothing unconstitutional in the aforesaid legislation (see herebelow under Constitutional Law).*

*Master and Servant—Contract of service—Enlistment of the employee in the National Guard only suspends the service relationship with his employer—Duty of the employer to re-employ the ex-conscript—Default—Consequences—See above under National Guard; and herebelow under Constitutional Law.*

*Contract of service—Enlistment of the employee in the National Guard—Effect on the service relationship—Duty of the employer to re-employ the ex-conscript—Default — Consequences — Remedies—See above under National Guard; and herebelow under Constitutional Law.*

*Legal Maxims—"Ubi jus ibi remedium"—See above under National Guard.*

*Constitutional Law—Unconstitutionality—Section* 24(1) *and* (2) *of the National Guard Law,* 1964 (*Law* 20/64) *as amended by section*

4 *of the National Guard (Amendment) Law* 1966 (*Law,* 5/66) *does not contravene the Constitution, particularly Articles* 25, 26 *and* 28 *thereof—See above under National guard; and herebelow under Constitutional Law—Question of whether issue of unconstitutionality can be raised for the first time on appeal, left open.*

*Constitutional Law—Articles* 25, 26 *and* 28 *of the Constitution—Article* 25 *protects the right to carry on any occupation, trade or business against direct interference therewith—Therefore, it does not apply to a case such as the present one where the interference with the business arrangements of the appellant by virtue of the provisions of section* 24(2) *of the National Guard Law* 1964 (*as amended,* supra) *is indeed very indirect and remote—Article* 26 *protects the freedom to contract—But it does not exclude legislation regulating contractual relations, as in effect sub-sections* (1) *and* (2) *of the said section* 24 *do—Article* 28 *safeguards the right to equality, subject always to reasonable differentiations between inherently different situations—Wherefore it cannot be said that the employer-appellant in this case is discriminated against by reason of the aforesaid legislation when compared with other employers in general.*

*Profession, trade or business—Right to carry on any profession etc. etc.—Article* 25 *of the Constitution—Scope of such right—See above.*

*Contract—Right to enter into contracts—Safeguarded under Article* 26 *of the Constitution—Scope of such right—See above.*

*Equality—Right to equality—Article* 28 *of the Constitution—Reasonable differentiations between inherently different situations not excluded—See above.*

*Observations* by the Court as to the desirability that section 24 of the National Guard Law (*supra*) should be made to correspond in full, and not only to a certain extent, to comparable provisions in England, such as section 1 of the Reinstatement in Civil Employment Act, 1944 and section 35 of the National Service Act, 1948.

This is an appeal by the employer, defendant in the action, against the judgment of the District Court of Famagusta adjudging him to pay to his former employee, the plaintiff in the action (now respondent in this appeal) and an ex-conscript the amount of £286 by way of salary for six months, by virtue of the provi-

sions of section 24(2) of the National Guard Law, 1964 (Law 20/64) as amended by the National Guard (Amendment) Law, 1966 (Law 5/66) section 4.

The salient facts of this case are that at the time of his enlistment, on March 27, 1965, for service in the National Guard, the respondent was in the employment of the appellant, a merchant in Famagusta; the respondent's duties, before his enlistment, were book-keeping duties, salesman's duties in the office and clearance of goods from the Customs. The respondent was discharged from military service on March 27, 1966, and upon that he requested his former employer (the appellant), as he was entitled to do under section 24(2) of the Law (*supra*), to re-employ him in the same or similar manner as before; the employer—appellant offered then to him employment as a travelling salesman, which the respondent rejected as not being according to him the same or similar to his employment in the office of the appellant in Famagusta before his enlistment. After that, the appellant tried to obtain other employment but he did not manage to do so with the result that he remained without work from March 27, 1966 until September 25, of the same year.

Under section 24(2) of the Law (*supra*) the respondent was entitled to be re-employed by the appellant in an occupation being the same or similar to the one in which he was employed before his enlistment, and under terms not less favourable than those which he would have enjoyed had he not enlisted; and as his employment with the appellant before his enlistment was of an indefinite duration, the respondent was entitled to be re-employed as aforesaid, after his discharge from military service, for a minimum period of six months.

It was argued on behalf of the appellant that:

(1) An action does not lie in this case because no remedy is provided for in section 24(2) (*supra*) in case of default by an employer in relation to his said obligation to re-employ his former employee under the said sub-section (2);

(2) The learned trial Judge was wrong in finding that the employment offered by the appellant to the respondent after the latter's discharge from the National Guard was not the same or similar to that in which the respondent was employed before his said enlistment;

(3) In any event, section 24(2) of the Law (*supra*) is unconstitutional in that it contravenes Articles 25, 26 and 28 of the Constitution. It is to be noted that this question of unconstitutionality was raised for the first time in the appeal.

Article 25 of the Constitution protects the right to carry on any occupation trade or business. Article 26 safeguards the freedom to contract and Article 28 the right to equality.

Dismissing the appeal, the Court:—

*Held: As to issue* (1) *hereabove:*

We find the appellant's said contention untenable; this is a clear case where the maxim "*ubi jus ibi remedium*" applies; once there was a private right vested in the respondent under the relevant legislation, he could obviously vindicate such right through civil proceedings, as he has done (see in this respect, *inter alia*, Halsbury's Laws of England, 3rd ed. Vol. 1 para. 10 pp. 7—8).

*Held: As to issue* (2) *hereabove:*

(1) The respondent adduced before the trial Court evidence to establish that the duties of a travelling salesman were different from those which he was performing before his enlistment; and the trial Court, accepting that evidence, found accordingly.

(2) We take the view that such a finding was fully warranted and we fail to see how the trial Court could have come to any different conclusion.

*Held: As to issue of unconstitutionality* (3) *hereabove:*

(1) Leaving open the question whether or not the appellant was entitled to raise the issue of unconstitutionality for the first time before us, we may say at once that we find no merit in the submission on behalf of the appellant that the legislation in question contravenes Articles 25, 26 and 28 of the Constitution.

(2) Article 25 protects the right to carry on any occupation trade or business; but it protects this right as such, against direct interference therewith, and cannot be held to be at all relevant to a case such as the present one where the interference with the business arrangements of the appellant, by virtue of the provisions of section 24(2) of the said Law (*supra*), is, in-

deed, very indirect and remote (see *inter alia, Police and Liveras,* 3 R.S.C.C. 65 and *The District Officer Nicosia and Ioannides,* 3 R.S.C.C. 107).

(3) Article 26 protects the freedom to contract but it does not exlude legislation regulating contractual relations (see, also, *Chimonides* v. *Manglis* (1967) 1 C.L.R. 125), as in effect section 24 does by providing by its sub-section (1) that the enlistment of a conscript does not terminate, but only suspends, the service relationship with his employer; and sub-section (2) follows as corollary of sub-section (1).

(4) Article 28 safeguards the right to equality subject always to reasonable differentiations between inherently different situations; and it cannot be said that the appellant as an employer, is discriminated against, when compared with other employers in general; the very fact that he is the employer of an enlisted person puts him in a situation different from that of the employer of a person who has not enlisted, and thus renders him properly subject—from the point of view of Article 28—to a provision such as sub-section (2) of section 24.

*Held: As a result:*

For all the foregoing reasons this appeal fails and is dismissed accordingly with costs.

*Appeal dismissed with costs.*

*Per curiam:* the appellant has been made to bear undue hardship in having either to re-employ the respondent as a clerk in the office or to pay him six months salary; and this was so because, during the time of the military service of the respondent, he had to replace him, and he did replace him by a female employee who could hardly be assigned duties of travelling salesman when the respondent claimed back under the Law his previous employment. Such hardship could have been avoided and the interests of the respondent substantially safeguarded if our section 24 had corresponded in full, and not only to a certain extent, to comparable provisions in England, such as section 1 of the Reinstatement in Civil Employment Act, 1944 and section 35 of the National Service Act, 1948; we have thought fit, in the circumstances, to draw the attention of the responsible authorities of the Republic to this aspect of the matter.

Cases referred to:

*Police and Liveras*, 3 R.S.C.C. 65;

*The District Officer, Nicosia and Ioannides*, 3 R.S.C.C. 107;

*Chimonides* v. *Manglis* (1967) 1 C.L.R. 125.

**Appeal.**

Appeal against the judgment of the District Court of Famagusta (Santamas Ag.D.J.) dated the 21st April, 1967 (Action No. 980/66) whereby the defendant was ordered to pay to the plaintiff the amount of £286 by way of salary for six months by virtue of the provisions of section 24(2) of the National Guard Law, 1964 (Law 20/64) (as amended).

*J. Kaniklides*, for the appellant.

*C. Antoniades*, for the respondent.

*Cur. adv. vult.*

The judgment of the Court was delivered by:

TRIANTAFYLLIDES, J.: This is an appeal, by the appellant–defendant, against the judgment of the District Court of Famagusta, in civil action 980/66, by means of which the appellant was ordered to pay to the respondent–plaintiff, as an ex–conscript, the amount of £286 by way of salary for six months, by virtue of the provisions of sub–section (2) of section 24 of the National Guard Law, 1964 (Law 20/64) as amended in this respect by section 4 of the National Guard (Amendment) Law, 1966 (Law 5/66).

The salient facts of this case are that at the time of his enlistment, on the 27th March, 1965, for service in the National Guard, the respondent was in the employment of the appellant, who is a merchant in Famagusta; the respondent was discharged from military service on the 27th March, 1966, and upon that he requested the appellant (as he was entitled to do under the said sub–section (2)) to re–employ him in the same or similar manner as before; the appellant offered to him employment as a travelling salesman, which the respondent rejected as not being, according to him, the same or similar to his employment, in the office of the appellant in Famagusta, before his enlistment.

By virtue of sub–section (2) of section 24 the respondent was entitled to be re–employed by the appellant in an occupation being the same or similar to the one in which he was employed before his enlistment, and under terms not less favourable than those which he would have enjoyed had he not enlisted; and as his employment, by the appellant, before his enlistment, was of an indefinite duration, the respondent was entitled to be re–employed, as aforesaid, after his discharge, for a minimum period of six months.

After his non–employment by the appellant the respondent tried to obtain other employment but he did not manage to do so and he remained without work from the 27th March, 1966 until the 25th September, 1966, when he left for Athens.

The first matter which we had to examine in this appeal was the contention of counsel for the appellant that there was no remedy provided for, in the legislation concerned, in respect of default by an employer in relation to his obligation under sub–section (2) of section 24 and, that, therefore, an action against the appellant, on the part of respondent, did not lie.

We find this contention entirely untenable; this is a clear case where the maxim "*ubi jus ibi remedium*" applies; once there was a private right vested in the respondent, by means of the relevant legislation, he could obviously vindicate such right through civil proceedings, as he has done (see, in this respect, inter alia, Halsbury's Laws of England, 3rd ed., vol. 1, para. 10, pp. 7–8).

The next, and the most crucial, issue, which we had to decide, was whether or not the learned trial Judge was entitled to find, as he has done, that the employment offered, by the appellant, to the respondent, after his discharge from the National Guard, was not the same or similar to that in which the respondent was employed before his enlistment:

By paragraph 2 of the statement of claim it was pleaded that the respondent's duties, before his enlistment, were book–keeping duties, salesman's duties in the office and clearance of goods from the Customs.

By paragraph 2 of the statement of defence the contents of paragraph 2 of the statement of claim were admitted; but it was pleaded, further, that the duties of the respondent could have been enlarged at any time, depending on the exigencies

of the business of the appellant, and that they would, actually, have been enlarged by the assignment to the respondent of duties of a travelling salesman, had he not enlisted in the National Guard.

The respondent adduced evidence to establish that the duties of a travelling salesman were different from those which he was performing before his enlistment; and such evidence was accepted by the trial Court as correct. Moreover, the appellant admitted, himself, in giving evidence, that the duties of a travelling salesman are "quite different" from those of a clerk in an office.

The trial Court found, on the material before it, that the employment offered to the respondent after his discharge from the National Guard was not, in the circumstances, the same or similar to the one in which he was employed before his enlistment.

We take the view that such a finding was fully warranted; actually, on the basis of the pleadings coupled with the aforesaid admission of the appellant–and, even, without the other evidence to that effect which was adduced by the respondent–we fail to see how the trial Court could have come to any different conclusion.

Of course, we need hardly stress that it depends on the particular circumstances of each case whether the employment offered to a person discharged from the National Guard by his employer, who was employing him at the time of his enlistment, is or is not the same or similar—in the sense of the relevant legislation—to his employment prior to such enlistment.

Counsel for the appellant has, also, argued that the legislation in question is unconstitutional in that it contravenes Articles 25, 26 and 28 of the Constitution.

Leaving open, and aside, in this judgment, the issue of whether or not the appellant was entitled to raise such an issue of unconstitutionality for the first time before us, having not done so, at all, before the trial Court, we may say at once that we find no merit in this submission on behalf of the appellant:

Article 25 protects the right to carry on any occupation, trade or business; but it protects this right, as such, against direct interference therewith, and cannot be held to be at all

relevant to a case such as the present one where the interference with the business arrangements of the appellant, by virtue of the provisions of sub–section (2) of section 24, is, indeed, so very indirect and remote (see, inter alia, *Police and Liveras*, 3 R.S.C.C. 65 and *The District Officer Nicosia and Ioannides*, 3 R.S.C.C. 107).

Article 26 protects the freedom to contract, but it does not exclude legislation regulating contractual relations (see, also, *Chimonides* v. *Manglis*, (1967) 1 C.L.R. 125), as in effect section 24 does, by providing, by means of its sub–section (1), that the enlistment of a conscript does not terminate, but only suspends, the service relationship with his employer; and sub–section (2) follows as a corollary of sub–section (1).

Article 28 safeguards the right to equality, subject always to reasonable differentiations between inherently different situations; and it cannot be said that the appellant, as an employer, is discriminated against, when compared with other employers in general; the very fact that he is the employer of an enlisted person puts him in a situation different from that of the employer of a person who has not been enlisted, and thus renders him properly subject—from the point of view of Article 28—to a provision such as sub–section (2) of section 24.

For all the foregoing reasons this appeal fails and it is dismissed accordingly, with costs.

We would add, however, that though we have found in favour of the respondent in this case, because it was plainly our judicial duty so to do, we feel, nevertheless, that as the Law stands, there has not resulted a totally just outcome of the actual situation before us: The appellant has been made to bear undue hardship in having either to re–employ the respondent as a clerk in the office or to pay him six months' salary; and this was so because, during the time of the military service of the respondent, he had to replace him, and he did replace him, by a female employee, who could hardly be assigned duties of travelling salesman when the respondent claimed back, under the Law, his previous employment. Such hardship could have been avoided–(and without the interests of the respondent not being substantially protected)–if our section 24 had corresponded in full, and not only to a certain extent, to compar-

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able provisions in England, such as section 1 of the Reinstatement in Civil Employment Act, 1944 and section 35 of the National Service Act, 1948; we have thought fit, in the circumstances, to draw the attention of the responsible authorities of the Republic to this aspect of the matter.

*Appeal dismissed with costs.*