

[VASSILIADES, P., TRIANTAFYLLIDES, JOSEPHIDES,
LOIZOU, HADJIANASTASSIOU, JJ.]

1970
June 23

NIKI IOANNOU,

NIKI IOANNOU
v.

Appellant,

REPUBLIC
(MINISTER OF
FINANCE
AND ANOTHER)

and

THE REPUBLIC OF CYPRUS, THROUGH

1. THE MINISTER OF FINANCE,
2. THE MINISTER OF EDUCATION,

Respondents.

(*Revisional Jurisdiction Appeal No. 66.*)

Public Officers — Retirement benefits — Pension — Refusal of Accountant-General to accept repayment of an amount, received by the Applicant-Appellant under the Government Employees Provident Fund Law, Cap. 308, in the exercise of an option under section 16(3) of the Competence of the Greek Communal Chamber (Transfer of Exercise) and The Ministry of Education Law 1965 (Law No. 12 of 1965)—Such refusal being in excess of powers and without competence, as well as contrary to law viz. section 16(3) of said Law No. 12 of 1965 (supra)—Not within competence of the Accountant-General at that stage to take the sub judice decision—The matter will have to be dealt with and decided upon in future when and if the Appellant officer puts forward a claim regarding retirement benefits.

Retirement benefits—See supra.

Greek Communal Chamber—Transfer of exercise of competence—Law No. 12 of 1965 (supra)—Section 16(3) of said Law—See supra.

The facts sufficiently appear in the judgments delivered whereby the appeal was allowed and the decision of the Accountant-General challenged by the recourse was annulled.

Appeal.

Appeal against the judgment of a Judge of the Supreme Court of Cyprus (Stavrinides, J.) given on the 22nd November 1969 (Revisional Jurisdiction Case No. 88/66) dismissing a

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recourse against the decision of the Accountant-General whereby he refused to accept repayment by the Appellant of an amount of £104.060 mils, which consisted of her own and the Government's contribution to the Non-Pensionable Employees Provident Fund.

A. Triantafyllides, for the Appellant.

G. Tornaritis, for the Respondent.

VASSILIADES, P.: The Court is unanimous on the result of this appeal. Mr. Justice Triantafyllides will deliver the first judgment.

TRIANTAFYLLIDES, J.: This is an appeal from the judgment of a Judge of this Court, who determined, in the first instance, Recourse No. 88/66.*

The recourse was made by the Appellant—then Applicant—against a decision of the Accountant-General of the Republic, who comes under the Respondent Minister of Finance.

By his decision, which was communicated to the Appellant by letter dated the 19th March, 1966, the Accountant-General refused to accept repayment by the Appellant of an amount of £104.060 mils.

The Appellant, when she made her recourse, was a clerical assistant posted at the Ministry of Education. She came to be there after a somewhat complicated career in the public service, the history of which appears from, *inter alia*, the pleadings in the recourse and the contents of three files, related to her, which have been placed before us (file P. 472ST, file Π.472/2 and file 202Π).

I do not think that it is necessary, for the purposes of this judgment, to set out in detail herein the whole of such history; it suffices to mention the following:—

The Appellant (whose maiden name was Georghiou) held, originally, in the pre-Independence British Colonial Administration of Cyprus, the non-pensionable post of assistant school clerk. When, in 1960, by operation of the Constitution of the Cyprus Republic, her office came within the competence of the Greek Communal Chamber, she chose to serve under

* Reported in (1969) 3 C.L.R. 503.

such Chamber and she received back, under Article 192.4 of the Constitution, the aforementioned amount of £104.060 mils, which consisted of her own and the Government's contributions to the 'Non-Pensionable Employees Provident Fund, till the 31st December, 1960 (see, also, in this respect, the said letter of the Accountant-General dated the 19th March, 1966).

From the documents numbered 32, 34 and 35 in file P.472ST it seems that though, initially, the Appellant's services were treated, in June, 1961, as terminated, due to child-birth, she was, subsequently, in July, 1961, accepted back in service; later on, however, in August of the same year, 1961, her services came to an end because of reasons of health.

After about a year she filed Recourse No. 142/62, against a refusal of the Greek Communal Chamber to reappoint her; during those proceedings an agreement was reached as a result of which the Appellant was re-employed on a temporary monthly-paid basis as from the 14th August, 1963.

Then, in 1965, the Greek Communal Chamber was dissolved. In the Competence of The Greek Communal Chamber (Transfer of Exercise) and Ministry of Education Law, 1965 (Law 12/65), which was enacted in view of the dissolution of the Chamber and the creation in its place of the Ministry of Education, provision was made, by means of section 16, about the transfer of the Chamber's employees to the service of the Republic.

Sub-section (3) of section 16 reads as follows:-

“(3) The service of any such person with the Republic shall be deemed to be an uninterrupted continuation of his service with the Chamber:

Provided that any public servant having elected to serve with the Chamber and having thereupon received any retirement allowance, pension, gratuity or other similar benefit (hereinafter referred to as 'the retirement benefit') in respect of any period of service before such election may, within one month of the date of his posting under sub-section (1), elect either to return the retirement benefit received, whereupon his whole service from the beginning shall count as period of service for the purposes of retirement benefits, or not to return such retirement benefit, whereupon his period of service shall be reckoned for

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such purposes as having begun on the date of his assumption of duty with the Chamber.”

The Appellant was offered, under section 16, on the 3rd February, 1966, appointment in the public service of the Republic as clerical assistant (see the document numbered 6 in file 202Π). She accepted such offer on the 28th February, 1966, and on the same date, relying on sub-section (3) of section 16, she refunded to Government the aforesaid amount of £104.060 mils.

She received, in reply, the letter of the Accountant-General, dated the 19th March, 1966, informing her of his refusal to accept the refund of this amount; it is stated in the letter that as the Appellant was appointed at the Ministry of Education as from the 14th August, 1963, it was not open to her to elect to return such amount and her period of service prior to that date could not be taken into account.

I am of the opinion, in the light of all relevant material on record and in view of the object and effect of sub-section (3) of section 16, that the Appellant was entitled to refund the amount concerned. Moreover, it was not, at that stage, within the competence of the Accountant-General to decide whether or not the Appellant's previous period of service, before the 14th August, 1963, could be taken into account. This is a matter which will have to be decided, in the light of all material considerations, by the appropriate organ in the Republic, at the proper time in future, when and if the Appellant puts forward a claim regarding retirement benefits.

In view of the foregoing I have reached the conclusion that the administrative action taken by the Accountant-General, which is set out in his letter of 19th March, 1966, should be annulled, as having been taken in excess of powers and without competence, as well as being contrary to law, in so far as he may have been of the view that the Appellant was not entitled, under sub-section (3) of section 16, to refund the amount of £104.060 mils.

It follows that the decision appealed from, which treated as valid the stand taken in this matter by the Accountant-General, has to be set aside.

In the result this appeal is allowed and the *sub judice* decision of the Accountant-General is declared to be *null* and *void* and of no effect whatsoever.

VASSILIADES, P.: I agree that the Appellant was entitled, under the provisions of section 16(3) of Law 12 of 1965, to return the amount received from the Provident Fund when, on the abolition of the Greek Communal Chamber, her services passed to the general public service of the Republic. As already stated by my learned brother, the rather complicated history of the service of the Appellant appears in the files referred to, a perusal of which explains the confusion which resulted in the administrative decision challenged by the recourse and now annulled.

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JOSEPHIDES, J.: I also agree and I would like to add this. It would appear that this officer (the present Appellant) became pensionable after March 1966, and she now comes under the provisions of the Pensions Law, Cap. 311, as amended. Under the provisions of paragraph (1) of Regulation 16 in the Schedule to that Law —

“any break in service caused by temporary suspension of employment not arising from misconduct or voluntary resignation shall be disregarded for the purposes of this paragraph;”

which paragraph provides that, subject to certain exceptions, “only continuous service shall be taken into account as qualifying service or as pensionable service”. Certain powers are conferred by that regulation on the then Colonial Governor in Council, and it would appear now on the Council of Ministers.

It is a well known fact that in the case of a number of public officers the Government has in the past recognized as continuous service without break, suspension of employment which did not arise from misconduct or voluntary resignation. This is one more reason why the Accountant-General should not have taken upon himself to decide, in March 1966, whether the service of the Appellant, prior to August 1963, should or should not count as qualifying service or as pensionable service for the purposes of the Pensions Law. This question will have to be decided by the appropriate organ under the provisions of the Pensions Law at the time when this officer reaches the age limit or is otherwise retired.

LOIZOU, J.: I also agree that, for the reasons already stated, the provisions of section 16(3) of Law 12 of 1965 were applicable in the case of this Appellant and that it was not

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for the Accountant-General to make the decision complained of, contained in his letter of the 19th March, 1966, and that to this extent the appeal should be allowed.

HADJIANASTASSIOU, J.: I also agree that this appeal should be allowed, but I would like to add a few words of my own.

The Applicant was, until the 16th August, 1960, a public officer serving as an assistant school clerk at the education department. After the coming into operation of the Constitution, the Applicant, in accordance with the provisions of Article 192.4 has chosen to serve under the Greek Communal Chamber, and became entitled to receive from the Republic the amount of £104.060 mils as a gratuity. She continued serving until July, 1961, when the Chamber purported to retire her due to pregnancy.

On the 13th August, 1963, the Applicant made a recourse before the then Supreme Constitutional Court, seeking a relief to annul the decision of the Chamber not to re-employ her. Counsel for the Respondents in Court stated that his clients undertook to re-employ the Applicant as from the 14th August, 1963, on a monthly basis at a salary scale of £264-£406 as a typist. (See *exhibit 1*).

On the 3rd February, 1965, the Public Service Commission placed the Applicant in the post of clerical assistant, under the provisions of section 16 of the Competence of the Greek Communal Chamber (Transfer of Exercise) and The Ministry of Education Law, 1965, (Law No. 12 of 1965).

On the 28th February, 1966, the Applicant who found herself in the service of the Republic, elected within the proper time limit, to return the amount of gratuity which she had received earlier, to the Accountant-General.

On the 19th March, 1966, the Accountant-General replied to the Applicant, informing her that in accordance with material given to him by the Ministry of Education, her appointment appeared to start as from the 14th August, 1963. In his opinion, therefore, no question arises that she is entitled to return the amount which she had received at the time she had retired from the public service on the 31st December, 1960, and that he could not recognise the period of her service before that date. See *exhibit 3*.

Now section 16(1) so far as relevant is in these terms:-

" Subject to the provisions of sub-sections (4) and (5), any person who, immediately before the date of the coming into operation of this Law, shall be transferred, as from that date, to the service of the Republic, and be thereafter posted by the appropriate authority of the Republic therein, if practically possible, to a post the functions of which are comparable to the functions of the post held in the service of the Republic.

(3) The service of such person with the Republic shall be deemed to be an uninterrupted continuation of his service with the Chamber:

Provided that any public servant having elected to serve with the Chamber and having thereupon received any retirement allowance, pension, gratuity or other similar benefit (Hereinafter referred to as 'the retirement benefit') in respect of any period of service before such election may, within one month of the date of his posting under sub-section (1), elect either to return the retirement benefit received, whereupon his whole service from the beginning shall count as period of service for the purposes of retirement benefits; or not to return such retirement benefit, whereupon his period of service shall be reckoned for such purposes as having begun on the date of his assumption of duty with the Chamber".

On the 16th April, 1966, the Applicant feeling aggrieved because of the decision of the Accountant-General filed Recourse No. 88/66 seeking the following relief:-

- (a) Declaration that the decision of the Respondents contained in *exhibit 3* attached hereto, not to recognise Applicant's previous service in accordance with s. 16(3) of Law 12/65 is *null* and *void* and of no effect whatsoever.

On the 22nd November, 1969, the learned trial Judge, in dismissing the application of the Applicant, had this to say:-

"I have come to the conclusion that on her re-employment the Applicant had no right to her previous service being 'recognised' or taken into consideration in connection with

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any retirement benefit for which she might become eligible thereafter. Therefore she did not have any such right when she returned to the service of the central government under s. 16(1) of the 1965 Law. It follows that she had no option to exercise under the proviso to s. 16(3) of that Law and hence the subject decision was a valid one”.

With respect to the Accountant-General’s letter (*exhibit 3*) I find myself unable to agree, because the question of the recognition of Applicant’s previous service, particularly in the circumstances referred to by my learned brother Triantafyllides, J., is a matter that would have to be decided at a later stage by the appropriate authority when the Applicant retires from the public service. I would, therefore, uphold the submission of counsel for the Applicant that the Accountant-General had no competence to decide at that stage, that Applicant’s service was broken or not, or that the service of the Applicant prior to August, 1963, should or should not count as period of service for the purposes of retirement benefit. In the light of what I have said, I would set aside the judgment of the trial Judge on this point.

VASSILIADES, P.: In the result the appeal is allowed and the decision challenged by the recourse is annulled. The decision in question is that contained in the letter of the Accountant-General dated 19th March, 1966. As to costs, we have decided that in the circumstances of this case, we should make no order for costs in the recourse throughout.

*Appeal allowed. No
order as to costs.*