1979 July 5

[STAVRINIDES, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

STAVROULLA LYSSIOTOU,

Applicant,

and

THE REPUBLIC OF CYPRUS, THROUGH THE COUNCIL OF MINISTERS AND OTHERS,

Respondents.

(*Case Nos.* 146/67, 154/67, 53/68).

Public Officers—"Disciplinary" decisions—A decision is not "disciplinary" merely because it is unfavourable to the officer—To make it "disciplinary" it must be given on the ground of the commission by the officer concerned of a breach of duty and it must impose a sanction therefor—Decision concerning compulsory retirement—Sections 3(*a*)(*ii*), 5(1), 6(*a*), 7, 8, 10 *and* 12 *of the Pensions* (*Amendment*) (*No.* 2) *Law,* 1967 *and regulations* 2(*b*) 2(*c*) *and* 5 *of the Schedule thereto—Reasons for the decision being,* inter alia, *unfitness of officer to hold post in question—No breach of duty imputed—Decision not of a disciplinary nature—Not necessary that officer should have been given opportunity of being heard before such decision was taken.*

Pensions (*Amendment*) (*No.* 2) *Law,* 1967—*Whether unconstitutional.*

The applicant retired from the Public Service as Senior Dental Officer in charge of the Dental Department on the 1st January, 1968. On June 30, 1967, she was informed that the Council of Ministers, in exercise of the powers vested in it by proviso (ii) to para. (a) of subsection 1 of section 5 of the Pensions (Amendment) (No. 2) Law, 1967, decided that the provisions of sections 3(a)(ii), 6(a), 7, 8, 10 and 12 of the Pensions (Amendment) Law, 1967, and regulations 2(b), 2(c) and 5 in the Schedule thereto should not be applied in her case. She was further informed that in consequence of such decision she would continue to be under

the old terms as to pension which provided for compulsory retirement at the age of 55 years.

Hence these recourses.

Counsel for the applicant contended that the subject decision was void because (i) the applicant was not given the opportunity of being heard before it was taken and (ii) the Pensions (Amendment) (No. 2) Law, 1967, was unconstitutional.

Contention (i) was expressly rested on the premiss that the subject decision was of a disciplinary nature, because of the contents of a letter addressed to the applicant on July 19, 1967, by the clerk to the Council of Ministers. That letter, so far as relevant, reads as follows:

> " As has already been explained to you orally you failed as Director of the Dental Department and proved unfit to hold that post. You did not succeed in ensuring the regular and smooth functioning of the Department and a climate of co-operation and discipline in it. The reports submitted by you from time to time on the functioning and equipment of the Department as also of those serving in it proved in many respects groundless."

With regard to contention (ii) the alleged unconstitutionality was said to lie in the fact that under the Law in question the Council of Ministers is "in effect empowered to take a disciplinary decision which is within the exclusive competence of the Public Service Commission; alternatively the Council could only exercise its powers under s. 5(1)(a)(ii) of the Law if the Commission, on a reference to it of the matters stated in para. 2 of *exhibit* 3, found those matters to be true."

Held (1) that a decision by the administration regarding an officer subject to its authority is not "disciplinary" merely because it is unfavourable to him or her; that to make it disciplinary (a) it must be given on the ground of the commission by the officer concerned of a breach of duty and (b) it must impose a sanction therefor; that here no breach of duty was imputed to the applicant; and that, accordingly, the subject decision was not of a disciplinary nature.

(2) That both branches of contention (ii) above assume the

validity of contention (i) and as that has been rejected so must this.

Applications dismissed.

Recourses.

Recourses against the decision of the respondents whereby the applicant was required to retire at the age of 55 years.

A. Triantafyllides, for the applicant.

A. Frangos, Senior Counsel of the Republic, for the respondent.

Cur. adv. vult.

STAVRINIDES J. read the following judgment. The applicant retired from the Public Service as Senior Dental Officer in charge of the Dental Department on the 1st January, 1968. On that date according to her she was 56 years and six days old and according to the respondent one year older. This matter of her age is the subject of another application by her against the Republic (221/68), which at the request of both sides was adjourned sine die pending the determination of these cases.

In exercise of a power vested in it by proviso (ii) to s.5(1)(a) of the Pensions (Amendment) (No. 2) Law, 1967, the Council of Ministers on June 30, 1967, decided that

> " the provisions of ss. 3(a)(ii) ..... and the regulations in the Schedule thereto numbered 2(b), 2(c) and 5 were not to apply"

in the case of the applicant and three other public officers, the intended effect, so far as the applicant is concerned, being that she should continue to be bound by the original s. 8 of the Pensions Law, Cap. 311, providing for compulsory retirement of public officers generally at the age of 55 years (*exhibit* 4). That decision was conveyed to the applicant by a letter of the same date (*exhibit* 1), which states:

> " I have been instructed to inform you that the Council of Ministers by virtue of proviso (ii) to para. (a) of subsection 1 of s. 5 of the Pensions (Amendment) (No. 2) Law, 1967 ..... has ordered that the provisions of ss. 3(a)(ii), 6(a), 7, 8, 10 and 12 of the Pensions (Amendment) Law, 1967 ..... and regulations 2(b), 2(c) and 5 in the Schedule thereto shall not be applied in your case. In consequence of this you will continue to be under the old terms

as to pension, which provide for compulsory retirement at the age of 55 years".

By the earliest of these applications she seeks a declaration that the decision conveyed to her by the first sentence of that letter is "null and void and of no effect whatsoever".

On the following July 25 the Director of the Medical Department wrote to her as follows:

" I wish to inform you that you are retiring from the public service as from January 1, 1967. [This latter figure is an obvious slip for '1968']. I also wish to inform you that you are entitled to 84 days' vacation leave which is granted to you before that date, i.e. from October 9, 1967 until December 31, 1967";

and the prayer in the second application is for a declaration that

" the decision contained in *exhibit* 1 attached hereto [this being the letter I have quoted in the preceding paragraph] to the effect that applicant will retire from the public service on January 1, 1968, is null and void and of no effect whatsoever".

Finally, on January 29, 1968, a notice appeared in the official Gazette of the Republic stating that she had retired from the public service; and by the third application she claims a declaration that "the decision published in the Cyprus Gazette on January 29, 1968, and contained in *exhibit* 1" (this being a letter from the Director of the Personnel Department to her dated January 31, 1968, referring to her "retirement from the public service" and informing her that "she was being granted a gratuity and a reduced pension") "is null and void and of no effect whatsoever".

As appears from the foregoing, all these three applications in substance centre round the Council of Ministers' decision conveyed to her by the letter *exhibit* 1, and in fact Mr. Triantafyllides for the applicant in all four cases stated that the second and third applications were made ex abundanti cautela. Accordingly in what follows I shall be describing the decision conveyed to the applicant by *exhibit* 4 as "the subject decision", and all three applications will have the same outcome.

Now Mr. Triantafyllides argued that the subject decision is

void because (i) his client was not given the opportunity of being heard before it was taken, and (ii) the Pensions (Amendment) (No. 2) Law, 1967, is unconstitutional.

The first point was expressly rested on the premiss that the subject decision is of a disciplinary nature. This in turn is based on a letter that the Clerk to the Council of Ministers sent to the applicant on July 19, 1967 (*exhibit* 3), which reads:

> " In reply to your letter No. 9/35 and dated July 15, 1967, and independently of the matter raised thereby of 'the reasoning of the administrative act', as to which the possible argument and discussion are fully reserved, 'the reasons that led the Council of Ministers to the taking of the decision' referred to in your said letter were explained to you fully by the Minister of Health, whom you visited on July 1, 1967, after the delivery to you of my letter No. 12/62 dated June 30, 1967.
>
> As has already been explained to you orally you failed as Director of the Dental Department and proved unfit to hold that post. You did not succeed in ensuring the regular and smooth functioning of the Department and a climate of co-operation and discipline in it. The reports submitted by you from time to time on the functioning and equipment of the Department as also of those serving in it proved in many respects groundless."

I am unable to uphold this argument. A decision by the administration regarding an officer subject to its authority is not "disciplinary" merely because it is unfavourable to him or her. To make it disciplinary (a) it must be given on the ground of the commission by the officer concerned of a breach of duty and (b) it must impose a sanction therefor. Here no breach of duty was imputed to the applicant. The words "you did not succeed" on the contrary imply that she *tried* but failed, which is a matter, not of breach of duty, but of lack of the quality of leadership, failure in which could not entail disciplinary consequences. Again, the last sentence cannot fairly be construed as meaning that she deliberately misled the authorities—for which she could have no possible motive; and coming, as it does, immediately after the charge of failure to "ensure the regular and smooth functioning of the Department and a climate of

co-operation and discipline in it" admits of only one construction, and that is that it simply imputes to the applicant lack of administrative ability and nothing else. Accordingly in my view the subject decision was not of a disciplinary nature.

Coming now to the second point, the alleged unconstitutionality is said to lie in the fact that under the Law in question the Council of Ministers is, as counsel put it, "in effect empowered to take a disciplinary decision which is within the exclusive competence of the Public Service Commission; alternatively the Council could only exercise its power under s. 5(1)(a)(ii) of that Law if the Commission, on a reference to it of the matters stated in para. 2 of *exhibit* 3, found those matters to be true". Clearly both branches of this point assume the validity of the first one, and as that has been rejected so must this.

For the reasons given I have come to the conclusion that all three applications must fail, and they are hereby dismissed without costs.

Applications dismissed without costs.