1980 August 20

[SAVVIDES, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

PANAYIOTIS NEOCLEOUS AND OTHERS,
Applicants,

v.

THE REPUBLIC OF CYPRUS, THROUGH
THE EDUCATIONAL SERVICE COMMITTEE,
Respondent.

(*Case No.* 361/78).

Educational Officers—Educational service—New posts—Creation—Within the power of the Council of Ministers and not of the respondent Educational Service Committee—Which has no power to emplace any officer to any post for which no vacancy exists—Emplacement of applicants on scale B. 10, *in the absence of vacancies on scale B.* 12, *not unlawful or arbitrary—Sections* 23, 24, 25 *and* 27 *of the Public Educational Service Law,* 1969 (*Law* 10/69) *not applicable.*

Legitimate interest—Article 146.2 *of the Constitution—Acceptance of administrative act or decision without protest deprives acceptor of a legitimate interest to file a recourse against it.*

The applicants, who were technologists, applied for appointment in the Educational Service; and though they were holding all necessary qualifications for appointment as educationalists on salary scale B. 12, as there were no vacancies on scale B. 12, they were offered appointment on scale B. 10 which they accepted without any reservation. On July 12, 1978 their Counsel requested the respondent Educational Service Committee to emplace them on scale B. 12 in which they were entitled to be emplaced as of right. The Committee replied by letter dated 14.7.1978 that the number of posts on scale B. 12 was fixed in the Government Budget, that no appointment could be made

in excess of such number, that for the time being there were no vacant posts on scale B. 12 and their emplacement on scale B. 12 would take place as soon as new posts were created. Hence this recourse.

Counsel for the applicants contended that immediately an officer's name comes on the top of the list of candidates for appointment and such officer is eligible for appointment to a cetain post, the Ministry of Education has, by virtue of the combined effect of sections 23, 24, 25 and 27 of the Educational Service Law, 1969 (Law 10/69) a duty to write to the Council of Ministers for the creation of such post and the failure in this case to follow such course was contrary to the said provisions. Furthermore, Counsel argued, the applicants were erroneously and illegally emplaced on scale B. 10 because admittedly they had a right to be emplaced on scale B. 12.

Held, that the combined effect of section 23, 24, 25 and 27 of the Educational Service Law, 1969 (Law 10/69) does not impose a duty on the respondent Committee to write to the Council of Ministers for the creation of posts on scale B. 12; that there is no provision in Law 10/69 or in any other law empowering the respondent Committee to create new posts or to emplace any applicant to any post for which no vacancy exists because the power of creating new posts, the nature of such posts, the schemes of service and the qualifications required for the filling of such posts, are powers vested in the Council of Ministers; and that, accordingly, the recourse must fail.

Held, further, that if a person accepts an administrative act or decision without protest, he no longer possesses a legitimate interest entitling him to make a recourse against it in the sense of Article 146.2 of the Constitution; that the applicants accepted the offer made to them for appointment on scale B. 10 unreservedly and without protest; and that, therefore, they do not possess a legitimate interest entitling them to make a recourse against it in the sense of the said Article.

Application dismissed.

Cases referred to:

Papapetrou v. *Republic*, 2 R.S.C.C. 61;

Piperis v. *Republic* (1967) 3 C.L.R. 295;

Ioannou and Others v. *Republic* (1968) 3 C.L.R. 146;

Ioannou v. *The Grain Commission* (1968) 3 C.L.R. 612;
Markou v. *The Republic* (1968) 3 C.L.R. 267;
Myrianthis v. *Republic* (1977) 3 C.L.R. 165;
Tomboli v. *CY.T.A.* (1980) 3 C.L.R. 266.

Recourse.

Recourse against the refusal of the respondent to emplace the applicants on salary scale B. 12.

L. N. Clerides, for the applicants.

A. S. Angelides, for the respondent.

Cur. adv. vult.

SAVVIDES J. read the following judgment. The 19 applicants in this joint recourse seek for a declaration that the refusal and/or omission of the respondent Committee to emplace them on scale B. 12 of the salary scales applicable to educationalists possessing the qualifications of the applicant and which was communicated to the applicants' counsel by letter dated the 14th July, 1978, is null and void and of no legal effect, and that the respondent Committee should perform what they have so far failed to do in emplacing applicants on scale B. 12.

The undisputed facts of the case are as follows:

The applicants are technologists holding the necessary qualifications for appointment as educationalists on salary scale B. 12. Due to the non-existence of vacancies on scale B. 12 the applicants were appointed as educationalists on salary scale B. 10 where such vacancies existed. On the 12th July, the following letter (*exhibit* 2) was sent by counsel on behalf of the applicants to the Chairman of the Educational Committee:

"Πρόεδρον Ἐπιτροπῆς Ἐκπαιδευτικῆς
Ὑπηρεσίας,
Ἐνταῦθα.
Κύριε,

Ἔχω ἐντολὴν τῶν πελατῶν μου κ.κ. Παναγιώτη Νεοκλέους, Ἀνδρέου Χ'' Κυπρῆ καὶ Ντίνου Κωνσταντινίδη ἐκ Λεμεσοῦ ν' ἀναφερθῶ εἰς τὴν τοποθέτησίν των εἰς τὴν Ἐκπαιδευτικὴν Ὑπηρεσίαν κλῖμαξ Β10 ἐνῶ ἔχουν ἀξιολογηθῆ πρὸς τοποθέτησιν εἰς τὴν κλίμακα Β12, καὶ νὰ σᾶς παρακαλέσω νὰ μὲ πληροφορήσετε πότε οἱ πελάται μου θὰ τοποθετηθοῦν εἰς τὴν θέσιν εἰς τὴν ὁποίαν δικαιωματικῶς δικαιοῦνται νὰ τοπο-

θετηθοῦν, καθ' ὅτι οὗτοι προτίθενται νὰ διεκδικήσουν τὰ δικαιώματά των διὰ τῆς δικαστικῆς ὁδοῦ ἐὰν τὸ δίκαιον αἴτημα δὲν ἤθελε ἱκανοποιηθῆ τὸ συντομώτερον.

Διατελῶ,
Μετα τιμῆς
Λ. Κληρίδης
Δικηγόρος."

The English text, reads:

"Chairman Educational Committee,
E.V.

Sir, I have been instructed by my clients Messrs. Panayioti Neocleous, Andreas Hj. Kypri and Dinos Constantinides of Limassol, to refer to their emplacement in the Educational Service on scale B. 10, whereas they have been considered eligible for appointment on scale B. 12 and to request you to let me know as to when my clients will be emplaced on such scale in which they are entitled to be emplaced as of right, in view of the fact that they intend to pursue their rights by means of legal proceedings if their just claim is not satisfied at the soonest possible.

I remain,

Yours faithfully,
L. Clerides,
advocate."

A similar letter was sent on behalf of the rest of the applicants, on the 15th June, 1978 (*exhibit* 3). The difference between the two scales B. 10 and B. 12 consists in that scale B. 10 is a first entry and promotion post with a salary of £912 x £30—£1,032 x £36 with a top scale of £1,428, whereas, scale B. 12 is a first entry post with a salary of £1,164 x £36 with a top scale of £1,488. It is clear from the reply of the respondents and also from the facts before me that when applicants applied for appointment in the Educational Service, the only vacant posts that could be offered to them at the material time were posts on scale B. 10 as there were no vacancies on scale B. 12 and there was no provision in the budget for additional posts on scale B. 12.

It was the contention of counsel for applicants that once the applicants had the qualifications for emplacement on scale B. 12, the respondents had no right to emplace them on a scale

inferior both in salary and qualifications on the ground that there were no vacant posts on scale B. 12 and that the refusal of the respondents to emplace them accordingly, amounts to abuse of power and is in any event untenable. He further submitted that taking into consideration that scale B. 12 is a first entry post in respect of which the applicants held the required qualifications, it was the duty of the respondent Committee to move the appropriate organ, the Council of Ministers in the present case, to create these posts and such failure is being attacked by the present recourse. At least six of the applicants, according to their counsel, had been appointed and emplaced on scale B. 10 for periods ranging from three to six years' time which was long enough for the Ministry to move for the creation of posts on scale B. 12.

It was further contended by counsel for the applicants that when applicants accepted their appointment and emplacement on scale B. 10, they had to do so, because they were in need of work but accepted their appointments, with full reservation of their rights.

I find myself unable to accept this last contention of counsel for applicants, that applicants accepted their appointments with reservation of rights. It is evident from the files of six applicants (1, 2, 3, 7, 10 & 16) which were the only files counsel for the respondent Committee was asked to produce, that their acceptances were unconditional, and the other applicants have not adduced any evidence in support of their allegation.

The applicants, following the established practice in the Education Department submitted their applications, in the appropriate form, for appointment in the Educational Service, setting out their qualifications and the post for which they were applying. Their names were put on the waiting list, according to which appointments were made in the order of priority, as appearing on such list and on the basis of existence of vacancies.

Panayiotis Neocleous, applicant 1, submitted such application in July, 1973 and an offer was made to him for appointment on contract for a period as from 5th November, 1976 till the end of August, 1977. On the 29th November, 1976, the respondent Committee informed the applicant that having considered his technical experience and his previous employment in the various

firms appearing on the certificates, his salary was being readjusted from £912 to £1,002. In May, 1977 an offer was made to him for appointment on probation in a permanent post on salary scale B. 10 which applicant accepted in writing on the 30th May, 1977, unconditionally and without any reservation. In view of his acceptance, a letter was sent to him on the 4th June 1977 affirming his appointment.

Applicant No. 2, Andreas Hj. Kypri, submitted his application for appointment in March, 1973. He was offered temporary appointment on a yearly contract as from the 19th October, 1973 till the 31st August, 1977. On 26.5.1977, as in the case of the previous applicant, an offer was made to him for appointment on probation in a permanent post on scale B. 10. By letter dated 30.5.1977 the applicant accepted the said appointment unconditionally and without any reservation of rights.

Applicant No. 3, Dinos Constantinides, submitted his application on 27.5.1972 and he was offered appointment on yearly contracts as from the 15th October, 1973 till the 26th May, 1977 when an offer was made to him on similar terms for appointment on probation in a permanent post on scale B. 10. By his letter dated 2.6.1977 he accepted such appointment unconditionally and without any reservation as well.

Costas Skouroupattis, applicant No. 16, applied for appointment on the 6th August, 1975. On the 26th October, 1976 he was offered appointment on contract from the 23rd September, 1976 to the 31st August, 1977, which was renewed till the 31st August, 1978. On the 3rd May, 1978 an offer was made to him for appointment on probation in a permanent post as from the 1st May, 1978 on scale B. 10 which he accepted unconditionally and without any reservation of rights on the 9th May, 1978.

Athanassios Michaelides, applicant No. 10, submitted his application on the 13th July, 1976. He was offered temporary appointment on contract as from the 7th October, 1977 till the 27th April, 1978 when an offer was made to him for appointment on probation in a permanent post on scale B. 10 which he accepted unconditionally and without any reservation on the 9th May, 1978. In this case, the respondent Committee having taken into consideration his previous practical experience and

after an application was made by him in that respect, instead of emplacing him on the starting salary of scale B. 10, they gave him increments and his starting salary was £1,068 instead of £912.

Hapeshis Michael, applicant No. 7, submitted his application on the 3rd March, 1974. He was offered a temporary appointment on contract for the period as from 20th September, 1977 till the 27th April, 1978 when an offer was made to him for the appointment on probation in a permanent post on scale B. 10 which was accepted unconditionally and without reservation of his rights on the 10th May, 1978.

Full particulars concerning the position of the other applicants have not been asked for by counsel on their behalf, but it appears from the facts before me and the arguments advanced that the position of all applicants is the same, subject to variations concerning their period of employment. The admitted fact is that all applicants were offered appointments on scale B. 10 in which there were vacant posts and that applicants from the time of their appointment till the filing of the present recourse continued to be so employed in such posts. According to the facts before me and the arguments of counsel for applicants, the first time that a claim was made for emplacement on a higher scale was when *exhibits* 2 and 3 were sent on their behalf to the respondent Committee.

The factual position in the present case may be summarised as follows:

The applicants, in the same way as all other educationalists in other branches, had to submit an application for appointment in the Educational Department. Such applications were classified according to the respective subject and in the order they were received chronologically and an offer was made when a vacancy existed and an applicant's name appeared on the top of the list. In the present case, due to the lack of any vacancies for permanent appointment, the applicants were offered temporary appointments on contract which they accepted till the time when a vacancy would exist. When vacancies became available on scale B. 10, offers were made to the applicants for such posts and applicants accepted such offer unconditionally and as a result, they were appointed in several posts on such scale. Their right to be appointed on scale B. 12 was never denied by the respon-

dent Committee and it was made clear to them that when vacancies would appear on scale B. 12 or new posts on scale B. 12 were created by the Government and provision in that respect was made in the Estimates, their applications for appointment in such posts would be considered.

It is the submission of counsel for applicants that it was the duty of the respondent Committee to create new posts on scale B. 12 and appoint the applicants in such posts. By his argument counsel for applicants wants to introduce the principle that in all cases where there are candidates having qualifications for appointment in certain posts, they should be so appointed by the creation of new posts to accommodate them without any limits. In consequence, counsel submitted, what is contained in the respondent Committee's letter dated the 14th July, 1978 is a null and void decision.

Counsel for applicants based his argument on The Educational Service Law of 1969 (Law 10/69) and in particular on sections 23, 24, 25 and 27, the combined effect of which, counsel submitted, was that in cases of posts of first appointment, immediately an officer's name comes on the top of the list of candidates for appointment and such candidate is eligible for appointment in a certain post, the Ministry of Education has a duty to write to the Council of Ministers for the creation of such post and the failure in this case to follow such course is contrary to the said provisions. Furthermore, he argued that the applicants were erroneously and illegally emplaced on scale B. 10 because admittedly they had a right to be emplaced on scale B. 12.

Counsel for the respondent Committee rejected the submission of counsel for applicants that the respondent Committee acted contrary to law or that they failed to do anything which they were bound to do under the law in the present case. He submitted that the respondent Committee had no authority under the law to create new posts or to appoint the applicants in posts for which no vacancies existed because had they done so they would have acted illegally and ultra vires. The powers vested in the respondent Committee under the law are limited in considering applications and making appointments in already existing and approved posts.

Dealing with the argument that when a person has the necessary qualifications for appointment in a certain post for which

no vacancy exists, there is a duty on the respondent Committee for his immediate appointment to a post corresponding to his qualifications by the creation of new posts. If such proposition is accepted, it would lead to a situation of having to create continuously new posts every time that candidates submitted applications for appointment on the basis of their qualifications, to satisfy them, irrespective as to whether such post was necessary or not, or whether a vacancy existed. That would mean a policy creating new posts all the time instead of filling in posts which were vacant or were necessary to meet existing needs and which were within the limits and the provisions of the government budget.

With all the facts of the case and the arguments of counsel in mind, I am now coming to consider the various issues before me.

I shall deal first with the alleged failure of the respondent Committee to appoint the applicants on scale B. 12.

A lot was said by counsel for applicants that it was the duty of the Minister to move the Council of Ministers for the creation of new posts and that of the Council of Ministers to create new posts every time qualified candidates for appointment in such posts existed.

The present recourse is based on the refusal of the Educational Service Committee to appoint the applicants on scale B. 12 and not on any act or omission of the Ministry of Education or the Council of Ministers and therefore I have to consider the present case from the aspect of the act complained of. In reply to the letters sent by counsel for applicants, (*exhibits* 2 and 3) the Chairman of the respondent Committee informed him by letter dated 14.7.1978 (*exhibit* 1) that (a) the number of posts on scale B. 12 was fixed in the Government Budget and no appointment could be made in excess of such number, and (b) that for the time being there were no vacant posts on scale B. 12 and their emplacement on scale B. 12 would take place as soon as new posts were created or vacancies appeared in the order their names appeared on the list of candidates for appointment.

Was such reply wrong or contrary to law? Did the respondent Committee have the power under the law to create new posts to satisfy the demand of the applicants for appointment to such posts or appoint the applicants to such posts irrespective

as to whether there was provision in the Budget for additional posts or approved expenditure for such additional posts.

The answer to all these questions is definitely negative.

I find myself unable to accept the argument of counsel for applicants that the combined effect of sections 23, 24, 25 and 27 of Law 10/69 imposes any duty on the respondent Committee to act in the way submitted by counsel for the applicants. Section 23 defines what is meant by "appointment" and "promotion"; section 24 defines that each appointment in a post is subject to the schemes of service of such post; section 25 provides for the classification of the various posts into first entry posts, first entry and promotion posts, and promotion posts with an express provision that the classification of each post is fixed by the Council of Ministers in the Schemes of Service for each post.

Part III of the same law under the general title "Διάρθρωσις τῆς Ἐκπαιδευτικῆς Ὑπηρεσίας" makes express provision as to the creation of posts and their classification as follows:

"19.–(1) Θέσις τις δύναται νὰ εἶναι μόνιμος ἢ προσωρινή.

(2) Μόνιμος ἢ προσωρινὴ Θέσις δημιουργεῖται ὑπὸ ἢ δυνάμει νόμου ἢ κανονισμῶν ἐκδοθέντων δυνάμει τοῦ παρόντος ἢ οἱουδήποτε ἄλλου νόμου, καθοριζόντων τὸν τίτλον καὶ τὸν μισθὸν ἢ τὴν μισθοδοτικὴν κλίμακα τῆς θέσεως.

20. Ὁ ἀνώτατος ἀριθμὸς τῶν μονίμων ἢ προσωρινῶν θέσεων ὁρίζεται ὑπὸ τοῦ δημιουργοῦντος αὐτὰς νόμου ἢ κανονισμῶν.

21. Πᾶσα μόνιμος θέσις εἶναι συντάξιμος.

22. Αἱ θέσεις διαιροῦνται εἰς κατηγορίας καὶ τάξεις καὶ βαθμοὺς ὡς ἤθελε καθορισθῆ ὑπὸ τοῦ Ὑπουργικοῦ Συμβουλίου.

Νοεῖται ὅτι μέχρις ὅτου αἱ τοιαῦται κατηγορίαι, τάξεις καὶ βαθμοὶ καθορισθῶσιν, αἱ κατὰ τὴν ἡμερομηνίαν τῆς ἐνάρξεως τῆς ἰσχύος τοῦ παρόντος Νόμου ὑφιστάμεναι ὡς πρὸς τὰς διαφόρους θέσεις κατηγορίαι, τάξεις καὶ βαθμοὶ θὰ ἐξακολουθῶσι νὰ ὑφίστανται."

("19.–(1) A post may be permanent or temporary.

(2) A permanent or temporary post is created by or under a law or regulations made under this or any other

law, specifying the title and the salary or the salary scale of the post.

20. The maximum number of permanent or temporary posts is specified by the law or regulations creating them.

21. Every permanent post is pensionable.

22. Posts are divided into categories, classes and grades as may be determined by the Council of Ministers.

Provided that until such categories, classes and grades are determined, the categories, classes or grades concerning various posts, in force on the date of the coming into operation of this law, will remain in force").

There is no provision in the above law or in any other law, empowering the respondent Committee to create new posts or to emplace any applicant to any post for which no vacancy exists. The power of creating new posts, the nature of such posts, the schemes of service and the qualifications required for the filling of such posts, are powers vested in the Council of Ministers.

In *Papapetrou* v. *The Republic* (*Public Service Commission*) 2 R.S.C.C. p. 61, the Supreme Constitutional Court in dealing with the powers of the Public Service Commission, an organ similar in nature to the Educational Service Committee, had this to say (per Forsthoff P.) at pp. 66 and 67:

"As the executive power relating to the creation of new posts in the public service of the Republic and to the making and amending of schemes of service concerning existing or new posts, is a power relating to public offices and not to the public officers, as holders of such offices, it is not, thus, included among the powers which are entrusted to the Public Service Commission by Article 125 and such power remains vested in the Council of Ministers.

This view regarding the effect of paragraph 1 of Article 125 is clearly consonant with the powers of the Council of Ministers under Article 54 of the Constitution, particularly paragraphs (a) and (d) thereof.

In the opinion of the Court, therefore, the Public Service Commission, in the absence of any organic law on the

subject, is bound by all Schemes of Service relating to posts in the public service of the Republic which have either been expressly or impliedly approved by the Council of Ministers, either specifically or generally, and the Public Service Commission cannot deviate from such approved Schemes of Service and must observe their provisions in discharging its duties under the Constitution."

The above citation applies with equal force in the present case concerning the powers of the Educational Service Committee.

In the result, I find that the allegation of applicants that the failure of the respondent Committee in appointing the applicants on scale B. 12 was unlawful and arbitrary is untenable and in consequence the present recourse fails.

These is one more reason, however, why this recourse should fail. The applicants, as I have already found, accepted the offer made to them for appointment on scale B. 10 unreservedly and without protest. It has been repeatedly pronounced in a number of decisions of this Court that if a person accepts an administrative act or decision without protest, he, no longer possesses a legitimate interest entitling him to make a recourse against it in the sense of Article 146.2 of the Constitution. (*Piperis* v. *The Republic* (1967) 3 C.L.R. 295, *Ioannou & others* v. *The Republic* (1968) 3 C.L.R. 146, *Ioannou* v. *The Grain Commission* (1968) 3 C.L.R. 612, *Markou* v. *The Republic* (1968) 3 C.L.R. 267 and *Myrianthis* v. *The Republic* (1977) 3 C.L.R. 165).

In *Myrianthis* v. *The Republic* (*supra*) Triantafyllides, P. summarised the principle as follows at page 168:

"It is well established, by now, in the administrative law of Cyprus, on the basis of relevant principles which have been expounded in Greece in relation to a legislative provision there (section 48 of Law 3713/1928) which corresponds to our Article 146(2) above, that a person, who expressly or impliedly, accepts an act or decision of the administration, is deprived, because of such acceptance, of a legitimate interest entitling him to make an administrative recourse for the annulment of such act or decision".

All the above authorities were considered by me and the

principle reiterated in the recent case of *Maria Tomboli* v. *The Cyprus Telecommunications Authority* (1980) 3 C.L.R. 266.

For all the above reasons the present recourse fails and is hereby dismissed with no order for costs.

5 *Application dismissed. No order as to costs.*