1983 July 12

[A. LOIZOU, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

SOTERIS PAPAGEORGHIOU,

Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH THE EDUCATIONAL SERVICE COMMISSION,

Respondent.

(*Case No.* 2/83).

Disciplinary Offences—Disciplinary sentence—Severity of, cannot be tested and decided upon by means of a recourse under Article 146 *of the Constitution.*

The applicant in this recourse, a secondary education school master, challenged the decision of the respondent by virtue of which the disciplinary punishment of compulsory retirement was imposed on him.

On the contention of counsel for the applicant that the respondent Commission imposed in excess and/or abuse of power a sentence which was manifestly excessive in the circumstances:

Held, that an administrative Court cannot interfere with the discretion of the sentencing organ in passing sentence and the severity, as such of a disciplinary sanction cannot be tested and decided upon by means of a recourse under Article 146 of the Constitution; accordingly the recourse must fail.

Application dismissed.

Cases referred to:

Platritis v. Republic (1969) 3 C.L.R. 366 at p. 375;

Christofides v. CYTA (1979) 3 C.L.R. 99 at pp. 125-126;

Republic v. Mozoras (1970) 3 C.L.R. 210 at p. 221.

Recourse.

Recourse against the decision of the respondent imposing upon the applicant the disciplinary punishment of compulsory retirement.

M. Papapetrou, for the applicant,

R. Vrahimi (Mrs.), for the respondent.

Cur. adv. vult.

A. LOIZOU J. read the following judgment. By the present recourse the applicant seeks a declaration of the Court that the decision of the respondent which was communicated to the applicant by letter dated 8.12.1982 by which the disciplinary punishment of compulsory retirement was imposed on him, is null and void and of no legal effect whatsoever.

The applicant is a graduate of the Theological School of the Kapodistrian University of Athens. In 1976 he was appointed on contract, by the respondents, to the post of Master of Theology. On the 1.6.1980 he was appointed on probation to the the permanent post of Master of Theology.

In March 1981, while serving at the Stavros Strovolos Gymnasium, disciplinary proceedings were brought against him for disciplinary offences concerning his behaviour which amounted to contravention of his duties as an educational officer and also for striking his pupils; he was punished with a severe reprimand and a fine of C£150.

In September 1981 the applicant was charged with conduct unbecoming to his duties and obligations as an educational officer, in particular for striking his pupils and for instigating political discussions with his pupils in class. In all he was charged with 7 offences of striking his pupils on various occasions and with one offence of talking politics in class. He was called to appear before the respondent Commission on the 9.10.1981 by letter of the 10.9.1981 (exhibit "A" - Blue 115-116). On the same date he was also notified by letter (Blue 117) that he was interdicted as from 10.9.1981. Though he was finally served with the summons to appear in December 1981, he was not present at the hearing of his case on the 11.1.1982.

On the 12.1.1982, the respondent Commission decided as follows (Blue 130):

"

(3) The fact that he is subject to relapses and is incorrigible, because, despite the warnings of the Headmasters as well as of the Commission, on his previous appearance before it for similar disciplinary offences, that in the event of future serious offences, the Educational Service Commission shall impose a stricter punishment without excluding the punishment of dismissal also, the Educational Officer showed with his attitude that he did not take into account its warnings at all.

This behaviour of his shows an irresponsible character and it renders him unfit but also at the same time unsafe for the exercise of the function of educational officer.

The Commission unanimously and without any reservation decides that his removal is indicated from the Public Educational Service and to impose on him and for the eight charges the punishment of dismissal as from today, 12th January, 1982.

In accordance with section 74(3) of the Educational Service Laws 1969 to 1979, the amount (of emoluments) which has been retained during the duration of his interdiction will not be refunded to the educational officer."

On the 14.2.1982 counsel for the applicant submitted an application (exhibit 'A' - Blue 138-9) for re-examination and/or reconsideration of the decision of the respondent Commission by which he was dismissed. He based his application on the following reasons:-

"(A) During the hearing of the case the Educational Service Commission did not have before it material information concerning the offender and in particular:

(a) That he had at the relevant time health problems (psychological problems) and should have been examined and received treatment from a specialist psychiatrist.

(b) That he committed the offences which are contained in the charge sheet as a result of the condition of his health and not for the reasons which are stated in the

decision dated 12.1.1982 of the Educational Service Commission (irresponsible character etc.).

(B) Due to the ignorance of the Educational Service Commission as regards the state of the health of the offender and his need to undergo medical treatment, the Commission misconceived the real facts and reached the wrong conclusion.

(C) Due to the ignorance of the Educational Service Commission of the state of health of the offender and his need to undergo medical treatment, the Commission based its decision on reasons which did not exist in reality and reached a decision different from that which the real facts would justify.

(D) The offender did not appear at the hearing due to his state of health.

".

The Commission by its letter of the 6.10.1982 (exhibit 'A' - Blue 140) summoned before it applicant's counsel to argue his client's case. He appeared before the Commission on the 18.10.1982 and placed before it a medical report by Dr. G. Malekides, Specialist Psychiatrist, dated 14.10.1982, in which it is stated (exhibit 'A' - Blue 142):

"

He was re-examined on the 19.11.1981 and manifested a relapse with psychotic signs and aggressive behaviour.

He came for re-examination on the 15.2.1982. He stated that he was dismissed from his employment in September 1981 with charges of 'talking politics and hitting the pupils'. Since then he is being followed regularly and is receiving treatment. His mental condition has improved satisfactorily, he is free from psychotic elements with good general behaviour. His judgment is good and generally the higher mental functions are normal. He is also aware of his condition. He admits that before his dismissal in September 1981 he was touchy, irritable with ideas of persecution and was not taking medication.

It appears that before September 1981 and after his re-examination on the 15.2.1982 there was a relapse with the result that his general behaviour and ability to teach were affected.

.....".

The respondent Commission, according to the minute of the 18.10.1982 (exhibit 'A' - Blue 143) "... conferred and having taken into consideration all that the lawyer Mr. Papapetrou mentioned, as well as the fact that in its decision of the 12.1.1982, on imposing the punishment the behaviour of the Educational Officer during the procedure was taken into consideration among other things, decides to re-examine its said decision of the 12.1.1982 and sets as a date for re-examination the 6th November, 1982 ...".

On the 6.11.1982 the respondent Commission heard again counsel for the applicant. He admitted that his client did commit all the offences charged with but submitted that they were so committed by reason of his mental condition, the Commission should, therefore, see the whole matter under a different light. He further submitted that on the basis of the report of Dr. Malekides, his client was now able and fit to work. Consequently the issue before the Commission should be that his client committed the disciplinary offences charged with and that his mental condition should only be taken into account as a mitigating factor in passing sentence. It should not adversely affect his chances of employment. Since he is now well he should, in the circumstances, be re-employed (Relevant Minutes of the Commission attached as 'C' to the Opposition).

The Commission on the 8.12.1982 gave its decision (exhibit 'A' - Blue 149, Attachment 'D' to the Opposition, page 2, para. 4):-

"..... because the offences of which he was charged and punished are of very serious nature and because, as we repeatedly stressed, the Commission is determined to safeguard the proper order in the public educational service and to contribute to the best of its ability to the proper function of education, finds that the proper punishment must be proportional to the disciplinary offences which he himself admitted also during the proceedings of reconsideration of

committing. Under the circumstances the only punishment which the Commission unanimously finds that is proper is the punishment of compulsory retirement as from 12.1.1982. The decision of that date is reviewed and the punishment of retirement is imposed instead of the punishment of dismissal".

Hence the present recourse which is based on the following grounds of law:-

(A) Breach of the Law and/or the Regulations concerning the imposition of disciplinary punishment.

(B) Abuse or excess of power or wrong exercise of discretion.

(C) Misconception of fact.

(D) Wrong or defective reasoning.

Counsel for the applicant in his address has argued that the Commission in imposing the disciplinary sentence acted under a misconception of fact in that it failed to take into consideration, as a mitigating factor, that the applicant at the time of committing the disciplinary offences was mentally ill and thus imposed on him a sentence which was manifestly excessive.

I find no misconception of facts on behalf of the Commission. It is clear from the perusal of exhibit 'A' before me that the medical report of Dr. Malekides and the fact that the applicant had been mentally ill were before the Commission at all relevant times. In particular in its sub judice decision the Commission stated at p. 2, para. 3:

"In view of the fact that on imposing sentence on 12.1.1982 the Commission was not aware of the condition of the mental health of the master ___ and in view of the fact that this element constituted an element which existed at the time of the imposition of the sentence and which we did not have in mind, the Commission decides unanimously to review its decision of the 12.1.82".

It is abundantly clear, therefore, that the respondent Commission reviewed their decision in view of the applicant's illness and for the same reason they reduced the sentence imposed.

The second argument of the applicant is that the respondent

Commission acted in excess and/or abuse of power, on imposing sentence, by wrongly taking into consideration the previous disciplinary proceedings against the applicant since those were totally unconnected with the present proceedings which referred to offences committed, because of the applicant's mental illness and this was not the case at the previous instance. He ought to therefore have been treated as a first offender and given a lesser sentence. On the contrary the respondent Commission imposed in excess and/or abuse of power - it was the contention of the applicant - a sentence which was manifestly excessive in the circumstances.

It is well established in Administrative Law that an administrative Court cannot interfere into the discretion of the sentencing organ in passing sentence. In the *Greek Administrative Law*, by Kyriacopoulos, (4th Edition), Vol. C, p.308, it is stated:

> "Τὸ Σ.τ.Ε., ἐν τῇ ἀκυρωτικῇ αὐτοῦ δικαιοδοσία, δὲν ἐλέγχει τὴν κρίσιν τοῦ πειθαρχικοῦ δικαστοῦ περὶ τῆς βαρύτητος τοῦ παραπτώματος καὶ τῆς ἐπιβλητέας ποινῆς, διότι ταῦτα ἀπόκεινται εἰς τὴν ἐλευθέραν ἐκτίμησιν τοῦ δικάσαντος ὀργάνου".

In English:

> "The Greek Council of State in its revisional jurisdiction does not control the judgment of the disciplinary judge on the severity of the offence and the sentence that should be passed because these depend on the free evaluation of the adjudicating organ".

See also *Costas Platritis v. The Republic* (1969) 3 C.L.R. 366, at p. 375.

In *Christofides v. CYTA* (1979) 3 C.L.R. 99, at p. 125-6 it was stated:

> "On the question that the punishment imposed was excessively hard and cruel, without sharing this view, the answer is to be found in what was stated by Triantafyllides, J., in the *Republic v. Mozoras* (1970) 3 C.L.R. 210, at p. 221, where he said:
>
> > 'Lastly, I have to deal with the contention - again not decided by the trial Judge, once he had annulled the

dismissal of the respondent - that the disciplinary punishment imposed on the respondent was excessive. The short answer to this is that failing any legislative provisions entitling this Court, in the exercise of its competence under Article 146, to decide on the substance of certain aspects of disciplinary matters (and it would be in the interest of justice if such provisions came to be enacted here, as in Greece) the severity, as such, of a disciplinary sanction cannot be tested, and decided upon, by means of a recourse under Article 146 (see Kyriacopoulos on Greek Administrative Law, 4th ed. Vol. III, p. 305, p. 308)".

For all the above reasons and without in any case accepting the view that the sentence imposed was excessive in the circumstances, this recourse should fail and is hereby dismissed, with no order as to costs.

Recourse dismissed with no order as to costs.