

1983 October 6

[PIKIS, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

STELIOS PHYLACTIDES,

Applicant,

v.

THE REPUBLIC OF CYPRUS, AND/OR

1. THE EDUCATIONAL SERVICE COMMISSION,
2. COUNCIL OF MINISTERS, AND/OR
3. THE MINISTER OF EDUCATION,

Respondents.

(Case No. 477/82).

5 *Administrative Law—Administrative acts or decisions—Executory act—Confirmatory act—Informative act—Salary scales created by the Public Educational Service Law, 1981 (Law 12/81)—Emplacement of applicant on one such scale—Letter informing him of such emplacement—Is of an informative character and cannot be made the subject of a recourse.*

Public Educational Service Law, 1981 (Law 12/81)—Construction of section 4(b) of the Law.

10 *Educational Officers—Salary scales—Emplacement on—Section 4(b) of the Public Educational Service Law, 1981 (Law 12/81)—Construction.*

15 The applicant was at the time of the enactment of the Public Educational Service Law, 1981 (Law 12/81) holding a post in the educational service on scale B6 on the combined establishment of scales B3–B6. Following the enactment of this Law, the provisions of which envisaged automatic repositioning by conferring a right to educationalists to be emplaced on new scales applicant was emplaced on scale A7 of the combined establishment A5–A7. Under section 4(b) of this Law the holders of posts on the combined establishment of B3–B6 who
20 possessed the special academic qualifications, envisaged by the old scheme for promotion to scale B10, were eligible for

emplacement on scale A8–A10–A11 provided that they had served at the top scale of B6 for at least one year.

By this recourse the applicant pursued two alternative remedies.

- (1) A declaration seemingly directed against a positive act allegedly embodied in a letter of the respondents addressed to the applicant dated 26.8.1982 and, 5
- (2) a declaration challenging a continuing omission arising from failure of the respondents to give effect to the provisions of Law 12/81 in breach or defiance of the duty imposed by s.4(b) and emplace him on scale A8–A10–A11. 10

Held, (1) that to the extent that the recourse is directed against a positive act, it is patently unsustainable because the act challenged is not on any view an executory act. The letter disclosing the decision complained of, does no more than signify adherence of the administration to the course taken long ago shortly after the enactment of Law 12/81, in May 1981, when they emplaced the applicant on scale A7 of the combined establishment A5–A7. From that perspective, it is a confirmatory act. But, more accurately, the letter does no more than inform the applicant of the existing position without in any way purporting to incorporate any decision taken. The letter was essentially of an informative character and, therefore, non justiciable. 15 20

(2) That since applicant did not possess all the qualifications necessary for promotion to old scale B10 because he had neither reached the top of scale B6 nor served at that point for a period of a year at the time of the enactment of Law 12/81; and that as, by virtue of section 4(b) of the Law, possession of the necessary qualifications under the old schemes for promotion to B10 was a necessary prerequisite to regrading at scale A8–A10–A11, he had no right to be positioned at that grade; that, therefore, the Educational Service Commission owed him no duty they omitted to discharge; and that, on the contrary, they regraded him as provided by Law and far from omitting to carry out their duties under the Law, they gave effect to them in compliance thereto; accordingly the recourse must fail. 25 30 35

Application dismissed.

Cases referred to:

Paphitis v. Republic (1983) 3 C.L.R. 255.

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Recourse.

Recourse against the refusal of the respondents to give effect to the provisions of the Public Educational Service Law, 1981 (Law No. 12 of 1981).

5 *A. S. Angelides*, for the applicant.

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

Cur. adv. vult.

10 **PIKIS J.** read the following judgment. Resolution of the recourse turns exclusively on the interpretation of s.4(b) of the Public Educational Service Law - 12/81, for the reorganisation of the service, salary and otherwise and, its applicability to the circumstances of the applicant. The law aimed to restructure the service and alter the hierarchy by the establishment of new grades in the educational service. New grades were created and

15 provision was made for the repositioning of educationalists to new scales, in correlation to the position held, under the replaced schemes, at the time of the enactment of the law. The restructuring was, it seems, designed to elevate the position of educationalists, salary and status wise.

20 The legislative scheme envisaged automatic repositioning by conferring a right to educationalists to be enplaced on new scales, while casting a duty on the Educational Service Commission, responsible under the law for the manning and grading of the service, to implement the new scheme and make the necessary

25 adjustments.

 By his recourse the applicant pursues two alternative remedies:-

- 30 (1) A declaration seemingly directed against a positive act allegedly embodied in a letter of the respondents addressed to the applicant dated 26.8.82 and,
- (2) a declaration challenging a continuing omission arising from failure of the respondents to give effect to the provisions of Law 12/81 in breach or defiance of the duty imposed by s.4(b).

35 *To the extent that the recourse is directed against a positive act, it is patently unsustainable because the act challenged is not on any view an executory act. The letter disclosing the decision complained of, does no more than signify adherence of the*

administration to the course taken long ago shortly after the enactment of Law 12/81, in May 1981, when they enplaced the applicant on scale A7 of the combined establishment A5 -A7. From that perspective, it is a confirmatory act. But, more accurately, the letter does no more than inform the applicant of the existing position without in any way purporting to incorporate any decision taken. The letter was essentially of an informative character and, therefore, non justiciable. 5

The alternative ground discloses, on the face of the recourse, an omission amenable to judicial review for it charges the administration with failure to carry out a mandatory duty imposed by a statute, viz. s.4(b) - Law 12/81. Omission to carry out a positive statutory duty vests in the subject a correlative right to demand the discontinuance of the omission. A statute casting a positive duty on the administration may be contrasted with an empowering enactment that may be invoked at the discretion of the authority empowered thereby. Inaction in the latter case does not constitute an actionable omission. The time-bar set up by Article 146.3 for judicial review, is inapplicable in the case of a continuing omission to carry out a duty imposed by law. 10 15 20

The complaint respecting the omission is that respondents failed to regrade the applicant in accordance with their duty under s.4(b) of the Law. In particular, that they omitted to place him on the appropriate scale of the combined establishment of A8 - A10 - A11. Far from admitting omission of duty, respondents contended in the opposition and argued before me, that they carried out their duty to the full; consequently, the recourse ought to be dismissed. Not only, Mrs. Vrahimi argued, they applied the law in the right perspective, but added that they gave effect to it in the spirit of the agreement that preceeded it, between Government and the Trade Union of secondary school teachers, recorded in the memorandum of 20.1.81. In *Paphitis And Others v. Republic* (1983) 3 C.L.R. 255, I had occasion to review the implications of a collective agreement in the domain of public law. It has no impact. It creates neither rights nor liabilities at public law. I hasten to add, it is no aid for the interpretation of legislation notwithstanding that it may purport to reproduce it. The letter and language of a section of a law are our guide to its meaning as may be depicted in the con- 25 30 35

text of the purposes of the enactment, discernible from a reading of the statute as a whole. Consequently, neither prima facie coincidence nor prima facie divergence between the provisions of the memorandum and those of Law 12/81 are of any relevance to the interpretation to the provisions of the law.

In the case of s.4(b), the interpretation of the law presents no extraordinary complication. The fact that s.4(b) is expressed without economy of language does not obscure its meaning. Lack of concision does not in this case hide legislative intent.

10 Mr. Angelides argued in effect that, the first part of s.4(b) is the only relevant provision respecting the entitlement of holders of the posts B3 - B6, under the old scaling to emplacement on the new scale A8 - A10 - A11. It provides that the holders of posts on the combined establishment of B3 - B6 who possessed the

15 special academic qualification envisaged by the old scheme for promotion to scale B10, are eligible for emplacement on scale A8 - A10 - A11. Had the law ended there, the case for the applicant would have been ironcast. However, the afore-

20 mentioned qualifications are not the only qualifications required for emplacement on the new grade A8 - A10 - A11. As the law lays down, regrading on scale A8 - A10 - A11 is specifically subject to additional qualifications—"δικαιούνται, τηρουμένων τῶν λοιπῶν προϋποθέσεων..." (are entitled, subject to the remaining prerequisites ...). The qualifications are those required under

25 the old scheme for promotion from the establishment B3 - B6 to the post B10. One of these qualifications was service at the top scale of B6 for at least one year before becoming eligible for promotion to B10. Mr. Angelides submitted that the indistinguishable reference in the first part of s.4(b) to the holders

30 of the combined establishment B3 - B6, signifies an intention to do way with qualifications peculiarly connected with holders of the post B6. This argument overlooks that reference to scale B3 - B6 is made in a descriptive sense without any intention of blunting existing difference between officers at different rungs of

35 the ladder or equating them for purposes of regrading under the new scheme. The applicant possessed some but not all the qualifications necessary for promotion to B10 (old scale). He had neither reached the top of scale B6 nor served at that point for a period of a year. On 1.9.80 he reached the top of scale

40 B3 and climbed the ladder as from that day to B6. That was

the position he held at the time of the enactment of Law 12/81. And inasmuch as possession of the necessary qualifications under the old schemes for promotion to B10 was a necessary prerequisite to regrading at scale A8 - A10 - A11, he had no right to be positioned at that grade. Certainly the Educational Service Commission owed him no duty they omitted to discharge. On the contrary they regraded him as provided by law. 5

The inescapable conclusion is that respondents, far from omitting to carry out their duties under the law, they gave effect to them in compliance thereto. The recourse is dismissed. 10

I must record it is with reluctance I refrain from adjudging the applicant to pay costs. The law was clear. Applicant had every opportunity to advise himself correctly about his rights. In the result, the application is dismissed. Let there be no order as to costs. 15

Recourse dismissed with no order as to costs.