1984 July 5

[L. LOIZOU, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

PHOTIS PAPAPHOTIS,

Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH THE EDUCATIONAL SERVICE COMMITTEE,

Respondent.

(*Case No.* 493/80).

Administrative Law—Administrative acts or decisions—Conditional administrative act—Disciplinary proceedings against educational officer for absence from duty without leave—Application for leave of absence, for the period of absence which gave rise to the disciplinary offence, made after the conclusion of the hearing and before delivery of the decision—Such application not a matter that should have any bearing on the decision of the respondent nor was this a case in which the decision could, in view of its very nature, have been made conditional.

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

Public Educational Service Law, 1969 (Law 10/69)—*Educational officers—Absence from duty without leave—Punishment therefor—Section* 50 *of the Law does not make the imposition of the sentence of dismissal mandatory—Fact that in the last paragraph of the sub judice decision it is stated that the sentence of dismissal is "expressly provided also by* s.50 *of Law* 10/69"*—Cannot lead to the conclusion that respondents acted under the legal misconception that they had no discretion but were bound to impose the punishment of dismissal because the decision has to be read as a whole.*

The applicant, a master of Theology in the secondary education, was tried disciplinarily for the offence of absence from duty without leave during the academic year 1979-1980. The trial was concluded on the 13th September, 1980 and the case was adjourned to the 27th September, 1980 for sentence.

In the meantime, on the 17th September, 1980, the applicant wrote a letter to the Ministry asking for leave of absence without pay for the school-years 1979-80 and 1980-81 on the ground that, a year earlier, proceedings for the dissolution of his marriage were initiated in Greece and they were still pending. The Disciplinary Committee did not give its decision on the 27th September but, for want of time, adjourned it to the 25th October. On that day and after the Committee convened to deliver its decision counsel appearing for the applicant deposited a letter bearing the same date signed by him and addressed to the respondent committee requesting them to adjourn their decision sine die as the applicant had not received a reply to his application of the 17th September, 1980 for leave of absence for two years and as a result he had filed a recourse No. 358/80 against such failure. His request was not acceded to and the Committee proceeded and gave its decision* whereby the sentence of dismissal from the service was imposed on the applicant. Hence this recourse.

Counsel for the applicant mainly contended:

(a) That by the sub judice act or decision respondents deprived the applicant of his interest on his application dated 17th September, 1980 for leave of absence i.e. they deprived him of the status of a schoolmaster entitled to apply for leave of absence.

Counsel submitted in this connection that applicant's application for leave (dated 17.9.80) and the filing of the recourse (No. 358/80) were grounds for adjourning the delivery of the decision or, in the alternative, if same was delivered this should have been on a conditional basis.

(b) That the provisions of s.50 of Law 10/69 do not mean that when a person is absent without leave the punishment of dismissal is mandatory but that the committee had a discretion to impose any of the punishments provided in s.69 of the law which range from reprimand to dismissal.

(c) That as it transpires from the wording of the last

* The decision is quoted at pp. 920-921 post.

paragraph* of the decision the committee acted under the legal misconception that they were bound to impose the punishment of dismissal and had no discretion to impose any other of the punishments provided by s.69 of the law; and

(d) That the gravity of the offence was not such as to justify the dismissal of the applicant.

Held, (1) that the application to the Ministry for leave of absence retrospectively was not a matter that should, in the circumstances, have any bearing on the decision of the respondents nor was this a case in which the decision could, in view of its very nature, have been made conditional (see in this respect the Law on Administrative Acts by Stassinopoulos, 1951 ed., at p. 52 and Conclusions from the Jurisprudence of the Greek Council of State 1929-1959 at p.196).

(2) That section 50 of the Public Educational Service Law, 1969 (Law 10/69) does not and could not make the imposition of the sentence of dismissal mandatory; that if it were otherwise it might conceivably offend against the provisions of Article 12.3 of the Constitution; that this section merely purports to stress the gravity of the offence and enable the committee to impose even the maximum punishment provided by law.

(3) That since the Committee in the sub judice decision considered the plea in mitigation of the applicant that due to his personal circumstances he deserved the greatest leniency; that since they also considered the personal circumstances of the applicant and weighed them against the gravity of the offence; and that since they intimated what effects a lenient sentence might have on the proper functioning of the service, all those denote exercise of discretion in choosing a more severe sentence or the most severe sentence from amongst other punishments that it was open to them to choose; accordingly it cannot be held that the Committee thought that they had no discretion but were bound to impose the punishment they did.

* The last paragraph reads as follows:

"For the above reasons the committee decides unanimously that the only appropriate sentence is the sentence of dismissal as it is, besides, expressly provided also by s.50 of Law 10/69. The accused is sentenced to dismissal from the service as from the 26th October, 1980".

(4) That the severity of disciplinary sanctions cannot be tested and decided upon by means of a recourse under Article 146.

Application dismissed.

Cases referred to:

Republic v. Drymiotis (1971) 3 C.L.R. 400;

Republic v. Mozoras (1973) 3 C.L.R. 210 at p. 221;

Christofides v. CY.T.A. (1979) 3 C.L.R. 99 at p. 125.

Recourse.

Recourse against the decision of the respondents whereby the disciplinary punishment of dismissal from the service was imposed on applicant.

L. Papaphilippou, for the applicant.

M. Photiou, for the respondent.

Cur. adv. vult.

L. LOIZOU J. read the following judgment. By this recourse the applicant seeks a declaration that the act and/or decision of the respondents dated 25th October, 1980, by which they imposed on the applicant the disciplinary punishment of dismissal from the service as from the 26th October, 1980, is void and of no legal effect whatsoever.

The facts of the case are as follows:

The applicant held the post of Master of Theology in the secondary education. Having secured employment in Greece he was, on his own application, granted leave without pay in each year from the 1st January, 1974 until August, 1979. On the 7th May, 1979, he applied once again for leave without pay for the academic year 1979-80. He was informed by letter dated the 3rd July, 1979 that his application was not approved. By a letter dated 13th August, 1979, the applicant requested reconsideration of the decision refusing his application and on the 23rd August, 1979, he was informed that his application had been reconsidered but it was not found possible to alter the decision.

No other communication or correspondence was exchanged between the applicant and the respondents until the 14th March, 1980, when he was informed by a letter addressed to him by Mr. Mitsides, Inspector of Theological subjects, that he had

been appointed as an investigating officer to investigate the possible commission by the applicant of a disciplinary offence in view of the fact that he was absent from his service without justification and inviting him, if he so wished, to submit his written representations.

The applicant by letter dated 26th April, 1980, submitted his representations stating, inter alia, that various family problems had prevented him from returning to Cyprus and resume his duties and expressing his regret for the formal disciplinary responsibility towards the service and stating, in conclusion, that in any case he was ready to return and resume the duties of his post as soon as he was asked to do so.

On the 5th May, 1980, the investigating officer submitted his report on the investigation stating, inter alia, that he was of the view that the applicant, after he was informed by the Director of Technical Education by the letter of the 23rd August, 1979, of the decision of the appropriate authority not to grant his application for extension of his leave, ought to have returned to Cyprus and resume his duties and that his failure to do so constituted a disciplinary offence. The investigating officer, however, stressed as a mitigating circumstance the fact that the applicant acknowledged that he had committed a formal disciplinary offence about which he expressed his regret and also that he stated that he was ready to return and resume his duties as soon as he was asked to do so.

Thereafter, a charge was formulated against the applicant charging him that during the academic year 1979-80 he was absent from his duties without leave. The charge was transmitted to the Educational Service Committee together with the personal file of the applicant, who was summoned to appear before it on the 12th July, 1980, for the hearing of the disciplinary charge against him.

During the hearing of the charge which finally took place, after two adjournments, on the 13th September, 1980, counsel appearing for the applicant sought the leave of the Disciplinary Committee and entered a plea of guilty on his behalf and made his address in mitigation. At the conclusion of counsel's address the case was adjourned to the 27th September, 1980, for sentence.

In the meantime, on the 17th September, 1980, the applicant wrote a letter to the Ministry asking for leave of absence without pay for the school-years 1979-80 and 1980-81 on the ground that, a year earlier, proceedings for the dissolution of his marriage were initiated in Greece and they were still pending. As it appears from the record the Disciplinary Committee did not give its decision on the 27th September, but, for want of time, adjourned it to the 25th October. On that day and after the Committee convened to deliver its decision counsel appearing for the applicant deposited a letter bearing the same date signed by him and addressed to the respondent committee requesting them to adjourn their decision sine die as the applicant had not received a reply to his application of the 17th September, 1980 for leave of absence for two years and as a result he had filed a recourse No. 358/80 against such failure. His request was not acceded to and the Committee proceeded and gave its decision. The relevant part of the decision reads as follows:

"'Ο εὐπαίδευτος συνήγορος τοῦ κατηγορουμένου κατά τήν ἀξιόλογη ἀγόρευσή του ἐνώπιον τῆς 'Επιτροπῆς εἰσηγήθηκε ὅτι ἡ περίπτωσή τοῦ πελάτη του λόγω τῶν εἰδικῶν προσωπικῶν συνθηκῶν στὶς ὁποῖες εὑρίσκεται δικαιολογεῖ τὴν ἀπὸ μέρους τῆς 'Επιτροπῆς ἐπίδειξη τῆς μεγαλυτέρας δυνατῆς ἐπιείκειας.

Χωρὶς νὰ ἀμφισβητοῦμε τὶς προσωπικὲς συνθήκες τοῦ κατηγορουμένου ἀδυνατοῦμε νὰ παραβλέψουμε τὴ σοβαρότητα τοῦ ἀδικήματος τῆς ἀπουσίας χωρὶς ἄδεια καὶ ἰδιαίτερα στὴν παροῦσα περίπτωση τὸ γεγονὸς ὅτι στὰ ἐπανειλημμένα αἰτήματα τοῦ κατηγορουμένου πρὶν ἀπὸ τὴ δίωξη του γιὰ παράταση τῆς ἄδειας του ἡ 'Αρμόδια 'Αρχὴ ρητῶς ἀρνήθηκε τὴν παραχώρησή της. 'Από τῆς περατώσεως τῆς ἀλληγραφίας μεταξὺ τοῦ κατηγορουμένου καὶ τῆς 'Αρμοδίας 'Αρχῆς καὶ μετέπειτα ὁ κατηγορούμενος ἐνεργοῦσε μὲ γνώση του ὅτι ἦταν μακρὰν τῆς ὑπηρεσίας χωρὶς ἄδεια καὶ ἀνελάμβανε τὶς συνέπειες τῆς παραλείψεως του αὐτῆς.

'Η 'Επιτροπὴ πιστεύει ὅτι ἡ εὔρυθμη λειτουργία καθὼς ἐπίσης καὶ ἡ εὐταξία στὴ Δημόσια 'Υπηρεσία εἶναι στοιχεῖα χωρὶς τὰ ὁποῖα αὐτὴ δὲν μπορεῖ νὰ λειτουργήσει καὶ νὰ ἀποδώσει. 'Ανοχὴ καταστάσεων ὅπως ἡ περίπτωση τοῦ κατηγορουμένου θὰ δημιουργήσει κακὰ προηγούμενα μὲ δυσάρεστες

συνέπειες γιὰ τὴν ὁμαλὴ λειτουργία τῆς Δημόσιας Ἐκπαιδευτικῆς Ὑπηρεσίας.

Ὡς ἐκ τούτου ἡ Ἐπιτροπὴ ἀποφασίζει ὁμόφωνα ὅτι, ἡ μόνη ἁρμόζουσα ποινὴ εἶναι ἡ ποινὴ τῆς ἀπολύσεως ὅπως αὐτὴ ρητῶς προνοεῖται ἐξ ἄλλου καὶ ἀπὸ τὸ Ἄρθρο 50 τοῦ Νόμου 10/69. Ὁ κατηγορούμενος καταδικάζεται στὴν ποινὴ τῆς ἀπολύσεως ἀπὸ τὴν ὑπηρεσία του ἀπὸ τὶς 26.10.80."

("Learned counsel for the accused in his noteworthy address before the committee submitted that the case of his client, due to the special personal circumstances in which he is found, justifies the exercise of the greatest possible leniency on the part of the committee.

Without disputing the personal circumstances of the accused we are unable to disregard the seriousness of the offence of absence without leave and especially in the present case the fact that accused's repreated applications for the extension of his leave, before the initiation of proceedings against him, were expressly refused by the appropriate authority. As from the date of the termination of the correspondence between the accused and the appropriate authority, the accused was acting with full knowledge that he was away from his service without leave and was taking upon him the consequences of his omission.

The committee believes that the proper functioning as well as the good order in the public service are elements without which it cannot function and yield results. Toleration of situations like the case of the accused will create bad precedents with unpleasant effects on the smooth functioning of the Public Educational Service.

For the above reasons the committee decides unanimously that the only appropriate sentence is the sentence of dismissal as it is, besides, expressly provided also by s.50 of Law 10/69. The accused is sentenced to dismissal from the service as from the 26th October, 1980.")

The decision was communicated to the applicant by letter dated 29th October, 1980, and as a result the present recourse was filed.

It is based on the following grounds of law:

1. The respondents acted under a misconception of fact in that:

(a) They failed to conduct a proper or sufficient inquiry and to attach the necessary weight to applicant's letter dated 17th September, 1980 and the letter of his counsel dated 25th October, 1980 addressed to the Ministry of Education for leave of absence.

(b) They failed to take into consideration or inquire sufficiently or at all into the fact that applicant's recourse No. 358/80 was still pending.

(c) They failed to take into consideration and/or evaluate the fact that at the time of the issue of the sub judice decision or act applicant's application for leave of absence as well as his recourse 458/80 remained undetermined and that if the result of the aforesaid application for leave of absence or of recourse No. 358/80 was the granting of leave to the applicant then the disciplinary offence of the applicant would become non-existent and non-punishable.

(d) They failed to evaluate sufficiently or at all the special circumstances and personal or family circumstances of the applicant.

2. The respondents acted in excess and/or in abuse and/or usurpation of powers in that by the sub judice act or decision they indirectly anticipated a negative answer to applicant's application dated 17th September, 1980 for leave of absence and/or on his recourse No. 358/80.

3. The respondents acted contrary to the principles of good administration in that:

(a) By the sub judice act or decision they deprived the applicant of his interest on his application dated 17th September, 1980 for leave of absence i.e. they deprived him of the status of a schoolmaster entitled to apply for leave of absence.

(b) By the sub judice act or decision they deprived the applicant of his legitimate interest in his recourse No. 358/80.

4. The respondents failed to reason, properly or at all, their refusal to adjourn the delivery of the sub judice decision in violation of Article 29 of the Constitution, and/or the reasoning given lacks lawful basis or support and/or considered themselves bound or acted under a general policy which was not justified by the facts of the present case.

Learned counsel for the applicant did not elaborate in his address on grounds 1, 2 and 3 of the grounds of law except for submitting that applicant's last application for leave (dated 17.9.80) and the filing of the recourse (No. 358/80) were grounds for adjourning the delivery of the decision or, in the alternative, if same was delivered this should have been on a conditional basis.

It does not seem to me that there is any merit in counsel's submission. Applicant was aware since August, 1979, when his application for reconsideration of the decision not to approve his application for leave was also rejected, that he had no leave of absence and that if he did not resume his duties he would be absent without leave contrary to the provisions of s.50 of the law; yet he took no step whatsoever against such refusal but instead he remained silent and away from his duties for a year and it was only after he was charged with the disciplinary offence and pleaded guilty to it and the decision was reserved that he applied again for the grant of such leave retrospectively with effect from 1st September, 1979. This, to my mind, was a belated attempt to validate ex post facto the offence. I do not think that his application to the Ministry for leave of absence retrospectively was a matter that should, in the circumstances, have any bearing on the decision of the respondents nor do I think that this was a case in which the decision could, in view of its very nature, have been made conditional. See in this respect the Law on Administrative Acts by Stassinopoulos, 1951 ed., at p. 52 and Conclusions from the Jurisprudence of the Greek Council of State 1929-1959 at p. 196.

With regard to ground 4 learned counsel in the course of his address in effect made three submissions to the following effect:

(a) That the provisions of s.50 of Law 10/69 do not mean that when a person is absent without leave the punishment of dismissal is mandatory but that the committee

had a discretion to impose any of the punishments provided in s.69 of the law which range from reprimand to dismissal.

(b) That as it transpires from the wording of the last paragraph of the decision the committee acted under the legal misconception that they were bound to impose the punishment of dismissal and had no discretion to impose any other of the punishments provided by s.69 of the law; and

(c) That the gravity of the offence was not such as to justify the dismissal of the applicant.

I do not propose to dwell for long on submission (a) as it is quite clear that counsel's submission is legally correct. In fact counsel appearing for the respondents was in full agreement with this proposition. It is useful to note that s.50 of the Educational Service Law 10/69 is identical to s.60 of the Public Service Law 33/67 and that the Full Bench of this Court had occasion to deal with the latter section in the case of The *Republic* v. *Drymiotis* (1971) 3 C.L.R. 400. The question in that case was whether the disciplinary procedure envisaged by Law 33/67 had to be followed in the case of absence of a public officer without leave or whether, in view of the wording of s.60 of that law, the officer could be dismissed without such procedure being invoked merely on the strength of such section.

Although the issues were, on the face of them, somewhat different the judgment is helpful in that the pronouncements therein may legitimately be resorted to, by analogy, as a guide in deciding the issue in the present case. At p. 403 of the above judgment we read:

"In our view when s.60 is construed as part of the whole structure of Law 33/67 and is read together with s.73 there can be no doubt that it was not intended to deprive thereby a public officer of the protection of the disciplinary procedure prescribed in part VII of the law; the more so, as s.60 does not state that for being absent from duty without leave or for wilfully refusing or omitting to perform his duties a public officer shall automatically be dismissed in any case, but only that he is liable (ipokite) to dismissal from the service; and his dismissal would inevitably

entail the exercise, in the manner laid down by Law 33/67, of the relevant discretionary powers vested in the appellant Commission by means of such law."

In the light of the above there can be no question that s.50 does not and could not make the imposition of the sentence of dismissal mandatory. If it were otherwise it might conceivably offend against the provisions of Article 12.3 of the Constitution. In my view this section merely purports to stress the gravity of the offence and enable the committee to impose even the maximum punishment provided by law.

The important issue in the present case and the one upon which its outcome depends is submission (b) i.e. whether the committee, acting under a misconception of law felt bound to impose the punishment of dismissal because they thought that they had no discretion in the matter.

In arguing this point learned counsel relied on the wording of the last paragraph of the sub judice decision and particularly on the phrase "ὅπως ρητῶς προνοεῖται ἐξ' ἄλλου καὶ ἀπὸ τὸ ἄρθρον 50 τοῦ Νόμου 10/69". (as it is besides expressly provided also by section 50 of Law 10/69).

But it is neither safe nor permissible to take words in isolation and try to construe the whole decision from such words. The decision must be considered as a whole and in the light of its circumstances.

The first four paragraphs of the decision, the full text of which is to be found attached both to the Application and the Opposition, are introductory and relate to the charge, to the hearing of the case and to the facts which constitute the offence and which were admitted.

Paragraph 5 relates to the plea in mitigation and to the submission of counsel appearing for him that the case of the applicant, due to his special personal circumstances, merits the greatest possible leniency.

Then in paragraph 6 they refer to the personal circumstances of the applicant which they do not dispute and they say that, nevertheless, they cannot disregard the seriousness of the offence especially in view of the fact that his repeated applications for

the extension of his leave, before the initiation of the proceedings against him, were refused by the appropriate authority.

In the next paragraph they deal with what in their view are necessary elements for the proper functioning of the public service and they say that "toleration of situations like the case of the accused will create bad precedents with unpleasant effects on the smooth functioning of the public Educational Service."

Then follows the last paragraph in which the phrase, cited above, upon which learned counsel's argument is based, occurs.

A careful scrutiny of the sub judice decision reveals, in my view, that the committee did not feel that they were bound to dismiss the applicant in any case but exercised a discretion in the matter. If it were not so it would have been quite unnecessary for them to consider the plea in mitigation on behalf of the applicant that due to his personal circumstances he deserved the greatest leniency; and yet in paragraph 6 they consider the personal circumstances of the applicant and clearly weigh them against the gravity of the offence and his complete disregard and indifference to the fact that he was absent from duty without leave at a time when he applied, more than once, for such leave and his applications were refused. Then again in the penultimate paragraph they intimate what effects a lenient sentence might have on the proper functioning of the service; and finally, in the last paragraph they decide that "the only appropriate sentence" is the sentence of dismissal. This again denotes exercise of discretion in choosing a more severe sentence or the most severe sentence from amongst other punishments that it was open to them to impose. The phrase "ὅπως αὐτὴ ρητῶς προνοεῖται ἐξ ἄλλου καὶ ἀπὸ τὸ ἄρθρον 50" upon which almost the whole force of the argument of learned counsel was based, may not be a very apt phrase in the context of the whole decision and it is my view that it was used in order to reinforce the conclusion reached that "the only appropriate sentence" was that of dismissal. But, be that as it may, I would not be prepared, in the light of the whole circumstances of the case and the wording of the whole decision, to hold that it is an indication that the committee thought that they had no discretion but were bound to impose the punishment they did.

Lastly I have to deal with counsel's contention that the gravity

of the offence was not such as to warrant the disciplinary punishment imposed on the applicant. The short answer to this is that in a line of authorities it has been decided that the severity of disciplinary sanctions cannot be tested and decided upon by means of a recourse under Article 146. See, inter alia, *The Republic* v. *Mozoras* (1973) 3 C.L.R. 210 at p. 221 and *Chri. 'ofides* v. *CYTA* (1979) 3 C.L.R. 99 at p. 125.

In the result this recourse fails and it is hereby dismissed. There will be no order as to costs.

Recourse dismissed. No order as to costs