

1985 February 11

[A. LOIZOU, SAVVIDES, LORIS, STYLIANIDES AND PIKIS JJ.]

YIANNAKIS POTAMITIS,

*Appellant,*

v.

THE WATER BOARD OR LIMASSOL,

*Respondent.*

(Revisional Jurisdiction Appeal  
No. 346).

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*Time within which to file a recourse—Article 146.3 of the Constitution—Provisions of, mandatory and have to be given effect in the public interest—Exceptional circumstances may affect the running of time—Decision that applicant was not, as of right, entitled to retire at the age of 65— Productive of legal consequences and as such executory— No recourse against such decision—Subsequent decision, taken three years later, terminating applicant's services before attaining the age of 65—Recourse against such decision out of time because it was the first decision that had to be made the subject of a recourse.*

The appellant has since November, 1958 been the Manager of the respondent Board. Neither the Water Supply (Municipal and Other Areas) Law, Cap. 350 nor any Regulations made thereunder provided what was the retiring age of officers and servants of the Board but under the proviso to section 14 of the Law, such servants and officers were to hold Office during the pleasure of the Board.

The respondents at their meeting of the 6th December 1978 decided

(1) to ask the opinion of their legal adviser as to what was the retiring age of the Manager and that if his opinion was to the effect that there was no fixed retiring age ask the applicant to continue his services "aproskoptos";

(2) that if the opinion given was that the retiring age of the Manager was 60, he was to be given a two years' extension of service (which was granted by the same decision).

5 On the 14th February 1979, the Board considered the opinion of their legal adviser which was to the effect that no retiring age was envisaged for the Manager and as a result they unanimously decided that in no case an employee would be allowed to serve after the completion of  
10 the age of 65.

On the 30th November, 1981 the Board decided to terminate applicant's services as from the 28th February, 1982. As against the latter decision the applicant filed a recourse which was dismissed by the trial Court on the  
15 ground that it was filed out of time; and hence this appeal. The trial Court held that the decision reached by the respondents on the 6th December, 1978, with regard to the applicant, was that he was not, as of right, entitled, to retire at the age of 65 and, hence, they decided to  
20 "extend his services for two years"; that it was that decision of the respondents that had to be made the subject of a recourse and not their decision not to extend his services with them after the 28th February, 1982; and that, therefore, the applicant's recourse was filed out of  
25 time and it had to be dismissed.

*Held*, that on any construction of the decision of the 6th December, 1978 it defined the length of service of the appellant and rights consequent thereto; that it was, therefore, a decision productive of legal rights and as such executory; that the provisions as to time in Article 146.3  
30 of the Constitution are mandatory and have to be given effect in the public interest in all cases; that exceptional circumstances that are recognized as affecting the running of the prescribed period do not arise on the facts of this case (see *John Moran v. Republic*, 1 R.S.C.C. p. 10); that  
35 appellant on account of his position and his presence at the Board meetings had full knowledge of the decision giving rise to his right of recourse under Article 146 of the Constitution and so he ought, if he wished to invoke  
40 the jurisdiction of the Court under the said Article, to

have filed his recourse within the prescribed 75 days period as time runs from the date such knowledge is acquired; accordingly the appeal must fail.

*Appeal dismissed.*

Cases referred to: 5

*Moran v. Republic*, 1 R.S.C.C. 10.

**Appeal.**

Appeal against the judgment of a Judge of the Supreme Court of Cyprus (Demetriades, J.) given on the 3rd November, 1983 (Revisional Jurisdiction Case No. 469/81)\* 10 whereby his recourse against the decision of the respondents to terminate his services and/or retire him on the 28th February, 1982 was dismissed.

*J. Potamitis with G. Triantafyllides*, for the appellant.

*St. McBrides*, for the respondent. 15

*Cur. adv. vult.*

A. LOIZOU J. read the following judgment of the Court. The appellant was appointed, as from the 1st November, 1958, to the post of Manager of the respondent Board, which is a public utility corporation established under the provisions of the Water Supply (Municipal and Other Areas) Law, Cap. 350, (hereinafter to be referred to as the Law). The terms of his appointment are to be found in a letter dated the 20th September, 1958, which in so far as relevant to the issues raised in these proceedings provide as follows: 20 25

“(I)..... . . . . .

(II) The post is permanent and pensionable and the salary will be £1,236X42—£1,404X48—£1,548 plus cost of living allowance on the conditions and at the rates approved for Government Officers from time to time. You will enter the scale at £1,320 per annum. 30

\* Reported in (1983) 3 C.L.R. 1121.

- (III) .....
- (IV) .....
- (V) .....
- (VI) .....

5 (VII) *Pension and Gratuity.*

You will be eligible for pension or gratuity in accordance with the Pensions and Gratuity Scheme adopted by the Board and approved by His Excellency the Governor.

10 Should you at any time during your service become physically unfit to discharge your duties efficiently, the Board may retire you. Upon such retirement, the Board may award to you such pension and/or gratuity as is payable under the Regulations of the Board  
 15 in force at the time of your retirement”.

As pointed out by the learned trial Judge there did not exist at the time of the appellant’s appointment a Pension and Gratuity Scheme in force, nor did the Law or the Regulations made thereunder contained any provision as to  
 20 the retirement age of officers and servants of the respondent Board but, by the proviso to section 14 of the Law such servants and officers were to hold office during the pleasure of the respondent Board.

25 A Pensions and Gratuity Scheme was established on the 18th January, 1960, that made by regulation 1 the post of Manager pensionable. Regulation 13 provided as follows:

30 “No pension, gratuity or other allowance shall be granted to any officer except on his retirement from the service of the Water Board in one of the following cases:-

(a) On or after attaining the age of sixty years, or, in the case of voluntary retirement made with the approval of the Water Board, on or after attaining the age of fifty-five years;

35 (b) On the abolition of his office;

- (c) On compulsory retirement for the purpose of facilitating improvement in the organisation of the service to which he belongs, by which greater efficiency and economy can be effected;
- (d) On medical evidence to the satisfaction of the Water Board that he is incapable by reason of some infirmity of mind or body of discharging the duties of his office and that such infirmity is likely to be permanent.” 5

Before proceeding further, it may be pointed out here that in para. (a) hereinabove the word “after” following the words “on or” has been invoked on behalf of the appellant as suggesting that the age of 60 years was not the retirement age and that retirement age was not in any way specified. Furthermore that under the conditions of his appointment “retirement” could only be directed by the Board if the officer during his service became, as provided by Condition VII contained in the letter of the 20th September, 1958, hereinabove set out, physically unfit to discharge his duties efficiently. It may also be added here and that was, according to the learned trial Judge, an admitted fact, that the appellant during all the years of his employment had given to the respondent Board “faithful and a most excellent service”. 10 15 20

The first minute relevant to the question of the appellant’s retirement is that of the meeting of the respondent Board of the 6th December, 1978, which after referring to the fact that the Pensions and Gratuity Scheme had no provision for compulsory retirement when one reached the age of 60, and that the collective agreement reached between the trade unions and the respondent Board regarding the age of retirement did not apply to the appellant, decided unanimously: 25 30

- “(1) to ask the opinion of the Legal Adviser of the Board as regards the retirement age of Manager and that if the opinion was that there is no fixed retirement age, the Manager, Mr. Potamitis, would continue his services unhindered (aproskoptos). 35
- (2) That if the legal opinion was to the effect that the

retirement age of the Manager was the 60th, the Manager was to be given, (and by the present decision he is GRANTED) a two-year extension of his service and that during this period a Scheme of Service and a list of qualifications be prepared for the appointment of a new qualified Manager on the basis of invitation of applications at least six months before the expiration of the extension of service of Mr. Potamitis who would work with the new Manager for at least six months or more, if necessary, to assist him in assuming the management of the Board.

During the discussion of the subject by the Board, it was ascertained that there did not exist in the service of the Board a suitable qualified member of the staff for the replacement of the Manager with qualifications as those which the Board had in mind for the post of Manager, whereas it was mentioned that it had been offered to the Manager, irrespective of the above, to be transferred to the Provident Fund if he so elected and continue his service unhindered until completing the age of 65.

Also during the discussion of the subject, the Chairman of the Board proposed that in case of extension of the service of the Manager, same should be for one year. The Chairman of the Municipal Committee, Mr. Kolakides, proposed that it should be for two years and as the rest of the members of the Council agreed with this proposal, the Chairman did not insist to his own proposal and agreed also with the proposal of Mr. Kolakides."

The next meeting of the respondent Board took place on the 14th February, 1979, after they had received the opinion of their Legal Adviser. The relevant minute reads as follows:-

*"Trade Union Matters*

- (e) The opinion of the Legal Adviser on the subject of the retirement of the Manager which was filed and read, advised that there did not exist a fixed

age limit for the Manager. The Board, in the circumstances, was of the unanimous opinion that in no case any Officer should serve after the completion of the 65 year of his age."

The next minute refers to the meeting of the respondent Board of the 23rd October, 1980. It reads: 5

*"Manager*

The Chairman mentioned that the trade union of the Public Utility Bodies (SEK) had submitted a claim for the retirement of the Manager of the Board and asked that in case it was decided that his services would be continued, Mr. Potamitis would sign a declaration that he would not continue his services for more than a year. 10

The Chairman mentioned also that he replied to trade unions that the extension of the service of Mr. Potamitis for one at least year was necessary in view of the work and the obligations of the Board and given that the Engineer would be engaged in the subject of the study of the water pipe system and the works and problems arising therefrom. 15 20

Mr. Kolakides said that it would be a mistake if Mr. Potamitis at that stage of the work of the Council left the Board and that the work relevant to the MAC-LAREN study on principle should be completed before examining the question of his retirement and he added that he did not agree with the signing of any commitment with regard to this. Mr. Sycopetritis agreed with Mr. Kolakides and going further expressed the view that the Board could employ Mr. Potamitis as a counsellor for the works in the future. After the above, it was decided unanimously that the services of Mr. Potamitis be extended for one more year. Mr. Potamitis thanked for the trust which was shown to him and assured that he would continue rendering his services with the same zeal and devotion as in the past. He added, however, that the trade union should be reminded of the advice of the legal advisers of the Board which said that the Board had no obligation 25 30 35

to retire Mr. Potamitis at a certain age limit and that if it did so for any reason not covered by his appointment, there would be created the risk of an action for damages."

5 There followed the minute of the meeting of the respondent Board of the 26th November, 1981.

10 "The Board having in mind that the extension of the age of retirement of the Manager of the Board Mr. Yiannakis Potamitis, originally given for two years and then for one additional year, which basically expires at the end of February 1982 (he was born on the 13th February 1919), having in mind that the reasons for the given extension are now gone and in view of the serious objections for the further extension of his services, of a considerable number of employees which have culminated with the application to the Industrial Disputes Court, and despite the satisfactory work until to-day, of Mr. Potamitis, the Board has decided that the usefulness of Mr. Potamitis to the Board has ceased, and the Board having in mind that the Engineer who was employed one year ago can now to a satisfactory degree take over the responsibilities of the Manager, and therefore the further stay of Mr. Potamitis to the post of Manager is not necessary. 20 The Board has decided unanimously that a further extension is not justified and that he must retire on his attaining the age of 63 years of age having in the meantime been given the vacation leave he is entitled."

30 The learned trial Judge dismissed the recourse of the applicant on the ground that same had been filed out of time. He arrived at this conclusion on account of the fact that the decision reached by the respondents on the 6th December 1978, with regard to the applicant that he was not as of right entitled to retire at age of 65, hence they decided 35 "to extend his services for two years" and that it was that decision that had to be made the subject of a recourse and not their decision not to extend his services with them after the 28th February 1982, communicated to him by their letter of the 30th November, 1981 (exhibit 1).



The appellant challenges the whole of the said judgment on the following grounds.

- “1. (a) The trial Court wrongly decided that the recourse is out of time. It is respectfully submitted that the decision mentioned in the judgment dated 6th December, 1978, could not form the subject matter of a recourse and further the appellant could not have attacked such a decision. 5
- (b) The said decision was not final but was subject to the legal advice to be obtained, which legal advice was in favour of appellant’s claim in the present recourse. 10
- (c) In fact, such a decision was, later on, amended by grant of another extension of service of appellant.
- (d) In any case, exhibit 1 in the recourse is an executive administrative act and not a confirmatory one and can form the subject matter of a recourse. 15
2. (a) The trial Court wrongly decided that the respondents were entitled to terminate the services of the appellant in February 1982. 20
- (b) It is respectfully submitted that on the material before the Court, appellant should have been allowed to stay on in the service of the respondents as long as he could continue his services satisfactorily, or, alternatively, until he attained his 65th birthday.” 25

It is the case for the appellant that the decision of the respondent Board contained in its minutes of the 6th December 1978, was not a final one as it was conditional to the advice their legal adviser would give as to the question of the existence or not of retirement age in respect of the appellant. Moreover there were alternative proposals, though it transpires therefrom that the idea of the Board was that if there was no retirement age, he should be transferred to the provident fund which apparently meant taking what he was entitled to under the Pension’s and Gratuity Scheme 30 35

and work in a different relationship as far as pension rights were concerned, unhindered as it was stated until completing the age of 65.

5 There followed two proposals, one by the Chairman of the Board that in case of extension of the service of the Manager same would be for one year and that of the Chairman of the Municipal Committee, Mr. Kolakides, which was ultimately accepted by the Board, the Chairman not insisting on his own proposal that the extension should  
10 be for two years. There followed the legal advice which was examined by the Board and what transpired at the next meeting has to be read in conjunction with the previous one to which we have already referred. The unanimous opinion of the Board in the circumstances was at this second meet-  
15 ing, that in no case any officer should serve after the completion of the 65th year of his age. That is to say, a statement of general policy in which the appellant was obviously included and which came within the two year extension of service given to the appellant previously. What followed is  
20 the decision of the 23rd October 1980. It again speaks of "the usefulness of the appellant to the Board, the various views expressed, as well as the attitude of the Trade Unions and it was unanimously decided that the services of Mr. Potamitis be extended for one more year". That decision  
25 which is a final executory act was taken in the presence of the appellant who thanked for the trust which was showed to him and he assured them that he would continue rendering his services with the same zeal and devotion as in the past.

30 We do not feel that this statement should be taken as a waiver of any right depriving him of a legitimate interest. Its significance is that he became aware of the decision taken and if executory the seventy-five days period for challenging it could start running from that day. In fact he  
35 asked that the Trade Union should be reminded of the advice of the legal advisers of the Board and referred to its contents and concluded by saying that there would be created the risk of an action for damages. The significance of this last part of his statement being that the refusal to  
40 extend his service further after the lapse of the year's extension granted at that moment would inevitably give rise to

a cause of action. So he was also aware of the legal significance of the extension which he expected to be renewed from year to year there being no obligation to retire him at a certain age according to the legal advice and that if they did so, it would be for reasons covered by his appointment. 5

Whatever the position was before that meeting and even if we were to consider that no executory act regarding his retirement came to his knowledge before that date and even if we were to ignore the fact that at the meeting of the 6th December 1978, what was stated therein to have been decided was only an expression of intention as to what should be done in the future, one cannot now, faced with the minute of the meeting of the 23rd October 1983, consider that there had been no executory decision reached at that meeting regarding the applicant's retirement and that an extension of service was granted to him thereafter and that he had notice of the decision which set the time prescribed by Article 146.3 of the Constitution, in motion. 10 15

On any construction of this decision it defined the length of service of the appellant and rights consequent thereto. It was therefore a decision productive of legal rights and as such executory. 20

The relief claimed by the appellant in his recourse is this:- "Declaration that the decision of the respondents contained in exhibit 1, attached hereby to terminate applicant's service with the respondents on the 28th February 1982, and or retire the applicant on the 28th February, 1982, is null and void and of no effect whatsoever." We have already referred to the contents of exhibit 1, which significantly speaks that the approved extension of his retirement age expired on the 13th February, 1982, and that in accordance with the regulations in force the Board "decided to call upon you and by the present calls upon you to retire as from the 28th February 1982, and pay to you the proportionate pension." 25 30 35

We need not refer at length to the principles governing the question of the running of time prescribed in Article 146.3 of the Constitution. It is enough if we reiterate that this provisions is a mandatory one and has to be given 40

effect in the public interest in all cases. Exceptional circumstances that are recognized as affecting the running of the prescribed period do not arise on the facts of this case (see *John Moran v. Republic*, 1 R.S.C.C. p. 10. The appellant  
5 on account of his position and his presence at the Board meetings had full knowledge of the decision giving rise to his right of recourse under Article 146 of the Constitution and so he ought, if he wished to invoke the jurisdiction of the Court under the said Article, to have filed his recourse  
10 within the prescribed 75 days period as time runs from the date such knowledge is acquired.

For all the above reasons the appeal is dismissed on the ground that the recourse was filed out of time. In the circumstances, however, there will be no order as to costs.

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*Appeal dismissed with  
no order as to costs.*