

1985 March 26

[LORIS, J.]

IN THE MATTER OF ARTICLE 146
OF THE CONSTITUTION

LELLA ARGYROU,

Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH
THE EDUCATIONAL SERVICE COMMISSION,

Respondent.

(Case No. 60/85).

Administrative Law—Recourse for annulment—Impugning part of an administrative act—Justiciable—Article 146.4 of Constitution.

5 *Administrative Law—Administrative acts or decisions—Executory act—Second decision reached after new inquiry on new facts which came to light after the first decision—Second decision of an executory nature and therefore justiciable—Time within which to file a recourse starts to run from date of second decision—Immaterial if second decision*
10 *the same as the first.*

15 *Administrative Law—Due Inquiry—Decision transferring applicant from one school to another—Objection to transfer on medical grounds—Nothing in the sub judice decision indicating the nature of the inquiry—And nothing concerning the evaluation of either the facts stated in the objection or the contents of the medical report—Absence of due inquiry leads to a material misconception of fact—Sub judice decision annulled on this ground—And on the additional ground of complete absence of reasoning.*

20 The respondent, Educational Service Committee, at its meeting of 25.10.84, after accepting an objection submitted by another schoolmistress of Domestic Science in respect of her transfer at K. Pyrgos Gymnasium, decided to

transfer the applicant in the present case as from 29.10.84, to the Gymnasium of Paphos (18 periods) and the Gymnasium of K. Pyrghos (4 periods).

On 19.11.84 the applicant submitted to the respondent an objection in writing in respect of her transfer to K. Pyrghos Gymnasium only, asking the Commission to reconsider their decision accordingly. The said objection of the applicant was accompanied by a medical certificate dated 12.11.84 of a Senior Specialist Orthopedic Surgeon, to the effect that she was suffering from disc lesion that entailed "serious danger of reaching an accute phase". The medical certificate went on recommending "avoidance at all costs" of rattlings in a motor-car during long journeys and in particular on anomalous roads.

The respondent at a meeting held on 14.1.85 "after examining the submitted documents" decided* that it could not reconsider its decision for the transfer of the applicant at the Gymnasium of K. Pyrghos. This decision was communicated to the applicant by letter dated 15.1.1985, and by means of a recourse, which was filed on 18.1.1985, she attacked only that part of the decision which referred to her transfer at the Gymnasium of K. Pyrghos. In the sub judice decision there was nothing express or implied indicating the nature of the inquiry held by the respondent; and there was nothing therein concerning the evaluation by the Commission of either the facts stated in the objection or the contents of the medical report.

Held, (I) on the question whether a recourse impugning a part of an administrative act or decision only is justiciable:

That partial annulment is possible whenever partial annulment is sought; and that, therefore, the recourse is maintainable (see, also, Article 146.4 of the Constitution).

Held, (II) On the preliminary objection raised by the respondents to the effect that the recourse has been filed out of time:

That the Commission by re-examining the case on the

The decision is quoted at pp. 568-570 post.

basis of new facts which were not known to them on 25.10.1984 when the original decision was reached at, they did reach a second decision; that it is immaterial if the second decision led to the same result and that what matters is that the decision of 14.1.1985 was reached at after a new inquiry on new facts; that a new enquiry on new facts which came to light after the first decision render the second decision a decision of executory nature and therefore justiciable; and that once the decision of 14.1.85. is of an executory character—the present recourse which was filed on 18.1.85 cannot be considered that it was filed out of time.

Held, (III) on the merits of the recourse:

That the only conclusion that can be drawn from the examination of the decision of the Commission is that they failed to carry out a due enquiry on the matter the absence of which led to a misconception of a material fact which is apparent on the face of the decision; and that, therefore, the resulting misconception of a material fact must inevitably lead to annulment of that part of the decision, impugned by means of the present recourse.

Held, further, that administrative decisions must be duly reasoned so as to render possible their judicial control; that in the case in hand there is a decision which is so vocal about immaterial things and quite silent on matters on which a reasoning is expected; that there is nothing in the administrative file from which a reasoning may be deduced; and that, therefore, the sub judice decision must be annulled for the additional ground of complete absence of reasoning.

Sub judice decision annulled.

Cases referred to:

Decisions 138/30, 177/34, 697/34 996/36 of the Greek Council of State.

35 Recourse.

Recourse against the decision of the respondent to transfer applicant to K. Pyrghos Gymnasium.

A. S. Angelides, for the applicant.

E. Papadopoulou (Mrs.), for the respondent.

Cur. adv. vult.

LORIS J. read the following judgment. The applicant, a schoolmistress of Domestic Science in Secondary Education, impugnes by means of the present recourse that part of the decision of the respondent Educational Service Commission whereby she was transferred to K. Pyrgchos as well, as from 29.10.84.

The facts of the present case are very briefly as follows:

The respondent E.S.C. at its meeting of 25.10.84 after accepting an objection submitted by another schoolmistress of Domestic Science (who is not a party in the present case) in respect of her transfer at K. Pyrgchos Gymnasium, decided to transfer the applicant in the present case as from 29.10.84 to the 4th Gymnasium of Paphos (18 periods) and the Gymnasium of K. Pyrgchos—4 periods—(vide Appendix "A" attached to the opposition).

The decision in question was communicated to the applicant by letter dated 26.10.84 (vide blue 13 in her personal file); it is unknown when the aforesaid letter was received by the applicant who was at the time residing at Paphos, but it is definite that the applicant presented herself for duty at K. Pyrgchos Gymnasium on 31.10.84 (vide blue 14).

On 19.11.84 the applicant submitted to the respondent an objection in writing (vide blue 16) in respect of her transfer to K. Pyrgchos Gymnasium only, asking the Commission to reconsider their decision accordingly. The said objection of the applicant was accompanied by a medical certificate dated 12.11.84 (vide blue 15) of a Senior Specialist Orthopedic Surgeon, to the effect that she was suffering from disc lesion that entailed "serious danger of reaching an accute phase". The medical certificate went on recommending "avoidance at all costs" of rattling in a motor-car during long journeys and in particular on anomalous roads.

The E.S.C. did not reply to the applicant upto the beginning of January 1985; the advocate acting on behalf of the applicant submitted to the Commission on 2.1.85 a letter (vide blue 17) reminding of the objection of the applicant to her transfer at K. Pyrgchos Gymnasium on health reasons and inviting for a reconsideration of their decision.

The respondent at a meeting held on 14.1.85 (vide the relevant minutes in blue 19) "after examining the submitted documents" decided that it could not reconsider its decision for the transfer of the applicant at the Gymnasium of K. Pyrgchos.

This decision of the respondent dated 14.1.85 was communicated by a letter dated 15.1.85 (vide blue 18) to the advocate of the applicant.

The present recourse was filed on 18.1.85 and it is attacking only that part of the decision which refers to the transfer of the applicant at the Gymnasium of K. Pyrgchos only (for 4 periods); it does not impugn the decision in respect of her transfer to the Paphos Gymnasium (for the remaining 18 periods) obviously because she is residing at Paphos and her attendance at the Paphos Gymnasium does not necessitate travelling in a motor-car or at least travelling in a motor car for long distances.

Before proceeding to examine the merits of this case I felt duty bound to examine whether a recourse impugning a part of an administrative act or decision only is justiciable; and if so, what is the result if I am ultimately satisfied that the part impugned only should be annulled; in this connection I may add that it is true that no such issues were raised or argued before me by either side.

What an administrative Court can do by its decision is stated in Article 146.4 of our Constitution which reads as follows:-

"146.4 Upon such a recourse the Court may, by its decision-

(a) confirm, either in whole or in part, such decision or act or omission; or

(b) declare, either in whole or in part, such decision

or act to be null and void and of no effect whatsoever; or

- (c) declare that such omission, either in whole or in part, ought not to have been made and that whatever has been omitted should have been performed.” 5

In the Conclusions of the Greek Council of State 1929-1959 at page 225 under the Head “Nature and extent of the annulment” we read:

«Ἡ ἀκύρωσις εἶναι μερική, ὡσάκις αὕτη μόνον ἐζητήθη, ἔστω καὶ ἂν ἡ πράξις τυγχάνη πλημμελής ἐν τῷ συνόλῳ τῆς: 1877 (49), 2069(52). Ἄλλ’ ἡ Διοίκησις δύναται νὰ προβῇ εἰς ὀλικὴν ἀνάκλησιν τῆς πράξεως: 1877(49)...» 10

(“The annulment is in part when that was only asked for, and even if the act is defective in its entirety: 1877/49, 2069/52. But the Administration may proceed with the revocation of the whole act: 1877/49...”). 15

Also in the book of Tsatsos “Application for annulment before the Greek Council of State” 3rd ed. at p. 385 the following are stated: 20

«Ἡ δεχομένη τὴν περὶ ἀκυρώσεως αἴτησιν ἀπόφασις ἀκυροῖ καὶ μόνο ἀκυροῖ ἐν ὅλῳ ἢ ἐν μέρει τὴν προσβληθεῖσαν πράξιν...»

(“The judgment accepting the application for annulment, annuls and only annuls in whole or in part the attacked act...”). 25

As regards the partial annulment of the administrative act the following cases of the Greek Council of State are cited in support thereof: 138/30, 177/34, 697/34, 996/36. 30

From the above it is clear that the present recourse can be maintained and that the prayer is consonant to the legal principles applicable.

The respondent Commission in its opposition raises a preliminary objection to the effect that the present recourse has been filed out of time. 35

As the objection goes to the jurisdiction I intend to deal with it first.

In the instant case we have two decisions of the respondent E.S.C.

5 The first decision was reached at on 25.10.84; it appears in appendix "A" attached to the opposition; it was communicated by letter dated 26.10.84 to the applicant; we do not know when the said letter reached the applicant but it is positive that the applicant presented herself
10 for service at the Gymnasium of K. Pyrghos on 31.10.84. Therefore we can presume that on or before 31.10.84 the applicant knew of the aforesaid decision.

If the decision of 25.10.84 were the only decision then definitely the present recourse would have been considered
15 as filed out of time as at least 79 days have elapsed up to the date of filing (18.1.85), even if we compute the time from 31.10.84 when the applicant presented herself for duty at K. Pyrghos Gymnasium.

But the actual state of affairs is not so; the applicant submitted an application for reconsideration of her transfer to
20 K. Pyrghos on 19.11.84 (the so termed "objection") supporting such an application with a medical certificate dated 12.11.84 from a Senior Specialist Orthopedic Surgeon putting forward reasons of health (disc lesion).

25 I need not examine whether her aforesaid application was by a way of "hierarchical recourse" envisaged by the provisions of s.5(2) of Law 10/69 or whether it was mere application for redress addressed to a "competent public authority" under the provisions of Article 29.1 of our
30 Constitution.

Nor it is necessary to examine—as it was argued by learned counsel appearing for the respondent—whether the time of 10 days provided by regulation 22(1) of the Educational Officers etc... Regulations of 1972 (vide C.G. No.
35 972 Part III dated 10.11.72 under Not. 205) are to be strictly complied with or whether they are merely "indicative".

The fact remains that the new material, the application

of the applicant (blue 16) containing new facts and the accompanying medical certificate (blue 15) dated 12.11.84— which was submitted for first time—were examined by the respondent E.S.C. acting pursuant to regulations 16(1)(b) and 18(b) (i) of the Educational Officers etc. Regulations of 1972. They were examined on 14.1.85 and it is so clearly stated both in the minutes of their meeting when the 2nd decision was taken (vide blue 19) and in their letter addressed to the advocate for applicant on 15.1.85 (blue 18).

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So the respondent Commission on 14.1.85 after a re-examination of the case based on new facts, which were not known to the respondent on 25.10.84 when the original decision was reached at, did reach a second decision. It is immaterial if the second decision led to the same result as the first one of 25.10.84. What matters is that the decision of 14.1.85 was reached at after a new enquiry on new facts: the illness of the applicant, the nature and effect of the disc lesion from which she was suffering, the prejudicial effect and the imminent dangers on her health from travelling the long distance from Paphos to K. Pырghos, the bad conditions of the road etc.

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It is well settled that a new enquiry on new facts which came to light after the first decision, render the second decision, a decision of executory nature and therefore justiciable.

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Once therefore, the decision of 14.1.85, is of an executory character—having been reached at after a new enquiry on new facts—the present recourse which was filed on 18.1.85 cannot be considered that it was filed out of time.

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Before dismissing the preliminary objection I feel that I should emphasize that if the applicant had a duty to lodge her objection within 10 days envisaged by regulation 22(1) of the Regulations of 1972, as submitted by the learned counsel for respondent, the respondent Commission had a duty as well to examine her objection within 15 days pursuant to regulation 22(2); furthermore independently of the said Regulations the respondent had a duty pursuant to the provisions of Article 29 of the Constitution to reply

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within a period not exceeding 30 days; it is regrettable that respondent received the objection of the applicant on 19.11.84 and did not reply to her on such a vital matter, before the 15.1.85.

5 I shall now proceed to examine the merits of the case.

It was stated earlier on in the present judgment that the respondent E.S.C. on 25.10.84 when examining an objection of another schoolmistress of Domestic Science complaining about her transfer to the Gymnasium of K. Pyrghos decided to revoke the said transfer and proceeded to transfer the applicant to K. Pyrghos as from 25.10.84.

10 The applicant after being informed of her said transfer submitted as already stated an objection (blue 16) to her transfer on grounds of health and accompanied her letter with a relevant Medical certificate (blue 15).

In her objection the applicant was stating *inter alia* that she was residing at Paphos (where she was also transferred to serve in the 4th Gymnasium of Paphos for 18 periods), that K. Pyrghos was far away from Paphos Town and that the condition of the road towards K. Pyrghos was bad; in view of the condition of her health (disc lesion which has forced her in bed for the period of October 1979 till December 1980) and the distance she had to travel she expressed her concern about the imminent dangers of deterioration of her health if the decision of respondent in respect of her transfer at K. Pyrghos was not reconsidered.

15 These complaints and fears of the applicant were substantiated by the medical report of the specialist to which although I have already referred earlier on in the present judgment, I feel that I should revert once more at least to remind what the Doctor recommended; "Avoidance at all costs" or rattlings in a motor-car during long journeys and in particular on anomalous roads.

20 In view of what is stated above, it is clear that anybody would be ready to concede that long journey in a car from Paphos Town to K. Pyrghos on an anomalous or simply bad road even once a week would have been dangerous to the health of the applicant who was suffering from disc lesion of such a nature that entailed "serious dan-

ger of reaching an acute phase” as the Doctor states.

What did the respondent Commission do after receiving the objection and the medical certificate?

The only thing that I could trace from the file is that the objection and perhaps the medical report, were circulated between the members of the Commission and I presume that the signatures appearing underneath the objection are the signatures of the Chairman and the members of the Commission.

Nothing else appears in the file except the decision of the Commission dated 14.1.85 (blue 19) which is verbatim as follows:

«ΕΠΙΤΡΟΠΗ ΕΚΠΑΙΔΕΥΤΙΚΗΣ ΥΠΗΡΕΣΙΑΣ
Πρακτικά 8/85 συνεδρίασις

Ημερομηνία 14.1.85 Ώρα: 9.30—11.00 π.μ.

Παρόντες

.....
.....

3. Αργυρού Λέλλα (ΠΜΠ. 4816), Καθηγ. Οικοκυρικών.

Ο δικηγόρος της πιο πάνω καθηγήτριας με επιστολή του με αρ. 105/85 και ημερ. 2.1.85 εγείρει το θέμα της μετάθεσης της πιο πάνω καθηγήτριας για μιὰ μέρα τη βδομάδα στο Γυμνάσιο Κάτω Πύργου.

Η Επιτροπή αφού μελέτησε τα υποβληθέντα έγγραφα αποφασίζει ως εξής:

Η μετάθεση της καθηγήτριας είχε αποφασιστεί στις 25.10.84 αφού η Επιτροπή είχε υπόψη της ότι στην Πάφο υπήρχε πλεόνασμα καθηγητριών Οικοκυρικών και αφού εξέτασε τις περιπτώσεις όλων των καθηγητριών Οικοκυρικών που υπηρετούν στην Πάφο. Η Επιτροπή για να μειώσει την ενδεχόμενη ταλαιπωρία από την μετάθεση αποφάσισε για τις 8 περιόδους των οικοκυρικών στό Γυμνάσιο Κ. Πύργου να μεταθέσει δυο καθηγήτριες από μιὰ μέρα τη βδομάδα.

Η Επιτροπή σημειώνει ότι στην Πάφο εξακολουθεί να

5 υπάρχει πλεόνασμα καθηγητριών Οικοκυρικών ενώ στο
 Γυμνάσιο Παραλιμνίου υπάρχει έλλειμμα μίας καθηγήτριας
 Οικοκυρικών. Έχοντας όμως υπόψη τις προσωπικές, οικο-
 10 γενειακές και άλλες συνθήκες των καθηγητριών Οικοκυρι-
 κών που υπηρετούν στην Πάφο αποφάσισε να μη καλύψει
 το έλλειμμα στο Παραλίμνι και το Υπουργείο Παιδείας έχει
 προβεί σε ορισμένες προσωρινές διευθετήσεις τόσο για
 την απασχόληση των καθηγητριών που πλεονάζουν στην
 15 Πάφο όσο και για την κάλυψη του κενού στο Γυμνάσιο
 Παραλιμνίου. Τα γεγονότα αυτά αναφέρονται για να επιση-
 μανθεί η ευνοϊκή μεταχείριση των καθηγητριών Οικοκυρι-
 κών Πάφου. Είναι όμως αμφίβολο αν αυτό θα μπορεί να
 ισχύσει και στα επόμενα σχολικά έτη.

15 Με βάση τα πιο πάνω η Επιτροπή αποφασίζει ότι δεν
 μπορεί να αναθεωρήσει την απόφαση της για τη μετάθεση
 της κας Αργυρού.»

(“EDUCATIONAL SERVICE COMMITTEE

Minutes of meeting 8/85

Date 14.1.85

Time 9.30—11.00 a.m.

20 Present

.....

3. Argyrou Lella (P.F. 4816), Schoolmistress of Domestic
 Science.

25 The advocate of the above Schoolmistress by his letter
 No. 105/85 dated 2.1.85 raises the subject of the transfer
 of the above Schoolmistress for one day per week to Kato
 Pырghos Gymnasium.

30 The Committee after studying the documents submitted
 decides as follows:

35 The transfer of the schoolmistress had been decided on
 25.10.84 since the Committee had in mind that in Paphos
 there was a surplus of schoolmistresses for Domestic Sci-
 ence and after it had examined the cases of all schoolmis-
 tresses of Domestic Science serving at Paphos. The Com-
 mittee in order to limit any possible hardship as a result

of the transfer decided that for the eight periods of Domestic Science at K. Pyrgos Gymnasium to transfer two schoolmistresses for one day each week.

The Committee notes that at Paphos there still continues to exist a surplus of schoolmistresses of Domestic Science whilst at Paralimni Gymnasium there is one schoolmistress of domestic science short. But having in mind the personal, family and other circumstances of the schoolmistresses of domestic science serving at Paphos decided not to cover the shortage at Paralimni and the Ministry of Education has proceeded with certain temporary arrangements for the employment of schoolmistresses who are surplus at Paphos as well as for the filling of the gap at Paralimni Gymnasium. These facts are mentioned in order to point out the favourable treatment of schoolmistresses of domestic science posted at Paphos. But it is doubtful if this can have effect for the next school years.

On the basis of the above the Committee decides that it cannot review its decision for the transfer of Mrs. Argyrou").

In the absence of any other material in the administrative file I have given anxious consideration to the contents of the decision of the E.S.C. set out above, in the hope that I might be able to trace anything express or even implied indicating the nature of the enquiry held by the respondent. With the exception of the words "after studying the submitted documents" obviously meaning the objection and the medical report I could trace nothing else concerning the evaluation by the Commission of either the facts stated in the objection or the contents of the medical report; they do not say even whether they have decided to accept or reject same.

The only conclusion that can be drawn from the examination of the decision of the Commission is that they failed to carry out a due enquiry on the matter, the absence of which led to a misconception of a material fact which is apparent on the face of the decision; they say that "the Commission in order to diminish eventual inconvenience from the transfer..."

With respect, I fail to see how, a disc lesion "with a serious danger of reaching an acute phase" if rattlings are not avoided at all costs, can be equated in the decision with "an eventual inconvenience."

5 The failure to carry out due enquiry is apparent and the resulting misconception of a material fact must inevitably lead to annulment of that part of the decision, impugned by means of the present recourse, which is also vulnerable on another ground notably lack of due reasoning.

10 It has been stated time and again that every administrative decision must be duly reasoned so as to render possible its judicial control. In the case in hand we have a decision which is so vocal about immaterial things and quite silent on matters on which a reasoning is expected;
15 and what is worse, there is nothing in the administrative file from which a reasoning may be deduced.

For all the above reasons, that part of the decision of the respondent E.S.C. which is being impugned by the
20 present recourse, i.e. the transfer of the applicant to K. Pyrghos Gymnasium as from 29.10.84 is hereby annulled for lack of due enquiry which led to a material misconception of fact and for the additional ground of complete absence of reasoning.

25 Respondent will pay £20.- towards the costs of the applicant.

Sub judice decision annulled. Respondent to pay £20.- towards costs.