1986 March 13

[SAVVIDES, J.]

IN THE MATTER OF ARTICLE 146
OF THE CONSTITUTION.

ANDREAS CHORAITIS

Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH
1. THE MINISTER OF INTERIOR,
2. THE COMMANDER OF POLICE,

Respondents.

(Case No. 662/84).

Res Judicata—Annulling decisions of this Court—Principles governing res judicata therefrom—Annulment on ground of lack of due reasoning—Principle of res judicata not applicable.

Constitutional Law—Constitution, Article 12.3—Chief of Police withholding in the exercise of his discretion emoluments deducted during period of interdiction imposed on applicant—In the circumstances not a "sentence" within the ambit of Article 12.3.

Police Force—The Police (Discipline) Regulations, Reg. 23(f)(iii).

Administrative Law—Revisional Jurisdiction—Discretion of administration—Principles governing interference with such discretion by the Court.

Applicant, an Inspector in the Police Force, was con-

sidered responsible for the escape of a detainee in the Limassol Police Station and as a result disciplinary proceedings were taken against him for neglect of duty and disobedience to orders The applicant was also interdicted and during the period of his interdiction he was being paid two-thirds of his emoluments He was eventually found guilty and sentenced to a fine of £20.

The Chief of Police in the exercise of his powers under reg 23 (f) (iii) of the Police (Discipline) Regulations decided that the applicant's emoluments, deducted as aforesaid during the period of his interdiction, be forfeited. As a result applicant filed a recourse to this Court the result of which was the annulment of the said decision of the Chief of Police for lack of due reasoning * The Chief of Police reconsidered the case, but reached the same decision as before, based on the following reasons namely (a) The fact that during the interdiction the applicant was receiving two thirds of his emoluments which is considered a reasonable and satisfactory arrangement, bearing in mind that during the said period he was not performing any of his duties, (b) The fact that during the said period he was receiving the maximum he could receive under the provisions of the relevant Regulation, and (c) The fact that his interdiction was necessary due to the seriousness of the offences as well as his rank in the service

Hence the present recourse Counsel for the applicant argued that (a) The Chief of the Police violated the principle of Res Judicata (b) The sub judice decision lacks due reasoning (c) The sub judice decision violates reg 23 (f) (iii) in that in fact an additional fine was imposed on the applicant and (d) The said Regulation violates Article 12 3 of the Constitution in that it empowers the Chief of Police to withhold without any control large amounts disproportionate to the disciplinary punishment for a disciplinary offence

Held dismissing the recourse (1) The judgment in *Choraitis v The Republic*, (1984) 3 C L R 1067 does

* See Choraitis v The Republic (1984) 3 C L R 1067

not amount to a res judicata disposing of the case in its substance, but it was a judgment annulling the previous decision of the respondent for lack of due reasoning. As a result of the annulment the Chief of Police was bound to consider the case and take a new decision on the matter and give due reasoning for his decision.

(2) Sufficient reasons are given as to how the Chief of Police exercised his discretion and reached the sub judice decision.

(3) In the circumstances of the present case the action by the Chief of Police does not amount to a sentence within the ambit of Article 12.3 of the Constitution.

(4) This Court does not interfere with the discretion of any organ vested with the same, if due weight has been given to all material factors, it has not been based on a misconception of fact and it was not exercised in abuse or excess of power. In the present case it was reasonably open to the Chief of Police to arrive at the sub judice decision.

Recourse dismissed.
No order as to costs.

Cases referred to:

Lambrou v. *The Republic* (1972) 3 C.L.R. 379;

Georghiades v. *The Republic* (1969) 3 C.L.R. 396;

Avgousti v. *The Permits Authority* (1972) 3 C.L.R. 356;

Merck v. *The Republic* (1972) 3 C.L.R. 548;

Kyriacou and Another v. *The Public Service Commission* (1974) 3 C.L.R. 358;

Tsangaris v. *The Republic* (1975) 3 C.L.R. 518;

Republic v. *Droushiotis* (1967) 3 C.L.R. 232.

Recourse.

Recourse against the decision of the respondents to withhold applicant's emoluments which were deducted during the period of his interdiction.

I. Typographos, for the applicant.

M. Florentzos, Senior Counsel of the Republic, for the respondent.

Cur. adv. vult.

SAVVIDES J. read the following judgment. Applicant is a police officer holding the rank of Inspector. On the 3rd February, 1980 whilst the applicant was the officer in charge of the shift work at the Limassol Police Station, a detainee in the lock-up in the Limassol Police Station escaped from custody. The applicant was considered responsible for such escape and a disciplinary charge was brought against him by the Limassol Divisional Police Commander accusing him of (1) neglect of duty and (2) disobedience of orders under the Police Regulations. In view of the seriousness of the charge the applicant was interdicted as from the 4th February, 1980 and during his interdiction he was being paid two-thirds of his salary. The disciplinary proceedings ended with the conviction of the accused in respect of the offences with which he was charged, as a result of which a sentence of £20.- fine was imposed on him. His interdiction was terminated on the 27th June, 1980. The applicant appealed against his conviction to the Council of Ministers under the provisions of regulation 20(2) of the Police (Discipline) Regulations, 1958. His appeal was dismissed by the Council of Ministers.

The Chief of Police in the exercise of his powers under regulation 23 (f) (iii) of the Police (Discipline) Regulations decided that the emoluments of the applicant for the period of his interdiction, 4.2.1980 - 27.6.1980, be forfeited and the applicant was informed accordingly. As a result, he filed Recourse No. 170/81, challenging the disciplinary

punishment of £20.- fine and the dismissal of his appeal and also the decision of the Chief of Police for the withholding of the one-third of his emoluments which had been deducted during the period of his interdiction. Such recourse was dealt with by me (see *Choraitis* v. *The Republic* (1984) 3 C.L.R. 1067) and the decision was delivered on the 2nd October, 1984. Such recourse was successful partly to the extent that the decision of the Chief of Police to withhold the part of the emoluments deducted during the period of the interdiction of the applicant, amounting to about £600 was annulled for lack of any reasoning.

Following such decision the Chief of Police reconsidered the case and reached a new decision which was communicated to the applicant by letter dated the 19th October, 1984 to which there was attached a minute of the Chief of Police as to the reasons which led him to the new decision to withhold the part of the emoluments of the applicant which were deducted during the period of his interdiction. The minute of the Chief of Police in this respect reads as follows:

"(1) I refer to the decision of the Supreme Court to allow that part of the recourse of Inspector Andreas Choraitis on the ground that my decision for the withholding of the emoluments which were deducted during his interdiction was not reasoned.

2. In the light of the above decision I re-examine the whole case and bearing in mind all the relevant facts and circumstances I decide that the emoluments of the applicant which have been deducted during the period of his interdiction be withheld.

3. I take seriously into consideration amongst others -

(a) the fact that during his interdiction he was receiving two thirds of his emoluments which is considered a reasonable and satisfactory arrangement,

bearing in mind that during the said period he was not performing any duties,

(b) the fact that during his interdiction he was receiving two thirds of his emoluments which is the maximum that he could receive under the provisions of the relevant Regulations, and

(c) his interdiction was necessary due to the seriousness of the offences for which he was charged and found guilty as well as his rank in the service."

As a result, the applicant filed the present recourse whereby he prays for the following relief:

"A declaration of the Court that the act and/or decision of the respondents dated 16th October, 1984 whereby, notwithstanding the revocation of a previous decision on the matter by a final judgment of the Supreme Court, the respondents decided to withhold the emoluments of the applicant which were deducted during the period of his interdiction, is null and void, illegal and unconstitutional."

The grounds which counsel for applicant advanced and argued in his written address in support of his recourse, are the following:

(1) The Chief of Police acted in violation of the principle of res judicata in that he dealt with a matter which has been finally and conclusively decided by the Court in the previous recourse of the applicant. The fact, counsel submitted, that the Chief of Police did not appeal against the judgment of the Court in Case 170/81, has deprived him of any right to deal with such matter again and that by so doing he acted contrary to the judgment of the Court in the said case.

(2) The sub judice decision lacks due reasoning and/or the reasoning is vague and uncertain.

(3) The sub judice decision was taken in violation of

regulation 23 (f) (iii) of the Police (Discipline) Regulations in that by withholding the payment of the emoluments of the applicant during the period of his interdiction the Chief of Police acted in substitution of the disciplinary tribunal and in fact imposed upon the applicant a fine of £600 additional to that of £20 imposed by the disciplinary tribunal. It was the contention of counsel for applicant that the imposition of such additional punishment was unreasonable and excessive, bearing in mind the fact that the disciplinary tribunal in the circumstances imposed a fine of £20 and that the Chief of Police failed to take into consideration the mitigating factors and the clean record of the applicant during his 30 years of service in the Police Force, facts which the disciplinary tribunal had taken into consideration and mentioned in its judgment.

(4) Regulation 23 (f) (iii) is unconstitutional, as violating paragraph 3 of Article 12 of the Constitution in that it empowers the Chief of Police to withhold without any control large amounts of deducted emoluments disproportionate to the disciplinary punishment for a disciplinary offence. Counsel contended that the power so vested in the Chief of Police is in fact a power of imposing an additional disciplinary punishment which in violation of paragraph 3 of Article 12 of the Constitution is disproportionate to the offence.

Counsel for respondents, by his written address and in reply to the arguments advanced by counsel for applicant, contended that the decision of the Court in the previous recourse does not amount to a res judicata on the matter, as the applicant succeeded on the ground that there was no reasoning in the decision of the Chief of Police who when re-examining the case and reaching the sub judice decision, for the reasons stated therein, acted in compliance with such judgment. He further contended that sufficient reasons are given in the sub judice decision justifying the action of respondent 1 under Regulation 23 (f) (iii). Counsel submitted that the provisions contained therein do not amount to a disciplinary punishment but is a natural consequence of an administrative measure taken in this case,

that is, the interdiction of the applicant for a certain period during which he was rendering no services. He submitted that Regulation 23 gives a discretionary power to the Chief of Police which was properly exercised and applicant has shown no reason why this Court should interfere with the exercise of such discretion.

I shall deal first with the question as to whether the previous decision of this Court in Case No. 170/81 amounts to a res judicata preventing respondent 1 from reconsidering the matter.

The extent of the principle of res judicata in the field of Administrative Law is dealt with by Kyriacopoulos in his text book on Greek Administrative Law, Vol. C. in which at page 157 we read:

«Η ὕπαρξις δεδικασμένου κρίνεται κυρίως ἐκ τοῦ διατακτικοῦ τῆς ἀποφάσεως».

("The existence of Res Judicata depends mainly on the operative part of the decision").

and under note 63 of the same page:

«Μόνον ἐκ τῆς ἀκυρώσεως πράξεως λόγῳ ἀνεπαρκοῦς ἢ ἐσφαλμένης αἰτιολογίας, δὲν παράγεται δεδικασμένον Σ.Ε. 206/1940 2309/1947».

("The annulment of an act by reason only of lack of due reasoning or of erroneous reasoning does not lead to Res Judicata.").

Also at p. 158 of the same book we read:

«Τὸ δεδικασμένον παραβιάζεται ἐκ μέρους τῆς διοικήσεως ἰδίᾳ διὰ τῆς ἔστω καὶ προσωρινῶς διατηρήσεως ἐν ἰσχύι ἀκυρωθείσης πράξεως· ἐκ τῆς ἐκδόσεως πράξεως, ἥτις ἐπανέρχεται ἐπὶ τῶν διὰ τῆς ἀκυρωτικῆς ἀποφάσεως κριθέντων, χωρὶς νὰ μνημονεύῃ νέον κρίσιμον στοιχεῖον· διὰ τῆς ἐκδόσεως νέας πράξεως τοῦ αὐτοῦ πρὸς τὴν ἀκυρωθεῖσαν περιεχομένου

ή χορηγήσεως άδείας διά συμπληρωματικάς έργασίας, κατόπιν άκυρώσεως άδείας άνεγέρσεως οίκοδομής· διά τής άντιθέτου έρμηνείας τών διά τής άποφάσεως έρμηνευθεισών διατάξεων· διά τής έρεύνης ζητήματος διοικητικής φύσεως, κριθέντος ήδη ούσιαστικώς· διά τής άποδοχής άντιθέτου άπόψεως έπί τοῦ κριθέντος ζητήματος· δι' άνακλήσεως πράξεως, κριθείσης νομίμου.»

("Res Judicata is broken by the administration by the preservation in force even if temporary of the annulled act; by the issuance of a new act which, without mentioning a material new element, repeats that which has been judged by the annulling decision; by the issuance of a new act with the same effect as the annulled act or by granting a permit for additional (supplementary) works, after the annulment of a building permit; by interpreting a rule in a way different from the interpretation given to it by the annulled decision; by inquiring into a matter of administrative nature, the substance of which has already been adjudicated upon; by acceptance of a view regarding the subject-matter adjudicated upon contrary to the view expressed by the decision; by revoking an act, which has been adjudged as lawful").

and at page 154:

«Διάφορος τής ώς άνω πρός συμμόρφωσιν ύποχρεσεως τής διοικήσεως, είναι ή πρός ένδεχομένην ένέργειαν ύποχρέωσις αύτής, ήτις άνακύπτει κατόπιν άκυρώσεως πράξεως, έκδοθείσης κατ' έλευθέραν έκτίμησιν. Διότι ή διοίκησις, μετά τήν άκύρωσιν, είναι έλευθέρα νά έκδώσῃ ή νά μή έκδώσῃ νέαν πρᾶξιν, καί μόνον, άν προβῆ είς έκδοσιν ταύτης, όφείλει νά συμμορφωθῇ πρός τήν άπόφασιν. Καί, άν μέν ή αίτησις άκυρώσεως έγένετο δεκτή διά παράλειψιν ούσιώδους τύπου, ή διοίκησις, έπανερχομένη έπί τής ύποθέσεως, όφείλει νά τηρήσῃ τόν παραλειφθέντα τύπον· άν δέ ή άκύρωσις έπῆλθε συνεπείᾳ έλλείψεως αίτιολογίας, ή έλλειποῦς αίτιολογίας, ή διοίκησις, έφ' όσον έπανέλ-

θη, όφείλει νά προσθέση τήν προσήκουσαν αίτιολογίαν.»

("The obligation of the administration to comply with an annulling decision is different from its obligation for potential action, which arise after annulment of an act, which the administration was free to issue or not to issue. Because in such a case, after the annulment of the act, the administration is free either to issue it or not to issue it, and only if it issues the act, it is bound to comply with the annulling decision. And, if the recourse was successful for failure to follow a material form, the administration is bound, when reissuing the act, to comply with such material form. If the annulment was due to lack of reasoning or incomplete reasoning, the administration, if it decides to reissue the act. is bound to add due reasoning").

Also in Spiliotopoulos Manual on "Administrative Law", 2nd Edition at page 461 under paragraph 511, it reads:

«Επί ακυρώσεως λόγω αναρμοδιότητος ή ελλείψεως ή ελαττωμάτων τής αίτιολογίας, δύναται επίσης ή Διοίκησις νά εκδώση νέαν πράξιν τοῦ αὐτοῦ περιεχομένου άρμοδίως ή μέ τήν προσήκουσαν αίτιολογίαν (ΣΕ 1340/1972, 2046/1975)».

("In case of annulment by reason of lack of competence or lack of reasoning or erroneous reasoning, the administration may issue a new act through the competent organ or with due reasoning").

In the Conclusions from the Case Law of the Greek Council of State at pp. 281, 282 under the heading *"Res judicata* - Compliance by the Administration" the following are stated:

«Εάν διοικητική πράξις ήκυρώθη δι' έλλειψιν αίτιολογίας ή διά παράβασιν έτέρου ούσιώδους τύπου διατεταγμένου ύπό τοῦ νόμου περί τήν ένέργειαν αὐτῆς,

ἀποβάλλει μὲν αὕτη πᾶσαν ἰσχύν, ἡ Διοίκησις ὅμως δύναται νὰ ἐπανέλθῃ ἐπὶ τῆς ὑποθέσεως προσθέτουσα τὴν προσήκουσαν αἰτιολογίαν καὶ ἐν γένει τηροῦσα τοὺς παραλειφθέντας τύπους.»

("If an administrative act has been annulled for lack of reasoning or for non compliance with any other material form provided by law in respect of the particular act, it ceases to have any legal effect, but the administration is free to deal once again with the case by adding due reasoning and generally complying with such omitted material forms").

In Dendias on Administrative Law, Vol. C. 2nd Edition, 1965, we read at the bottom of page 356:

«Δὲν δημιουργεῖται ὁμοίως δεδικασμένον ἐξ ἀκυρώσεως πράξεως δι' ἀνεπαρκῆ ἢ ἐσφαλμένην αἰτιολογίαν.».

("No Res Judicata arises by annulment of an act for lack of due reasoning or for erroneous reasoning").

In the circumstances of the present case and in the light of the above exposition of the law, I agree with the submission of counsel for the respondents that the judgment of this Court in Case No. 170/81 does not amount to a res judicata disposing of the case on its substance but it was a judgment annulling the previous decision of the Chief of Police on the ground of lack of reasoning. As a result of such judgment, the Chief of Police was bound to consider the case and take a new decision on the matter and give due reasoning for his decision. Therefore the contention of the applicant that the Chief of Police has acted contrary to the principle of res judicata is untenable.

As to the complaint of the applicant that the sub judice decision also lacks due reasoning, I find such contention as unfounded. From the contents of the sub judice decision sufficient reasons are given as to how the Chief of Police has exercised his discretion in the case and reached the sub judice decision.

I come next to consider the question whether the provisions of Regulation 23 (f) (iii) empowering the Chief of Police to withhold emoluments which had been deducted during the period of interdiction are violating Article 12.3 of the Constitution. Article 12.3 of the Constitution provides that a sentence disproportionate to the seriousness of the offence cannot be provided by law. In the present case we are not dealing with criminal proceedings but with a measure taken in furtherance of an administrative decision, that of the interdiction of the applicant pending disciplinary proceedings against him on serious charges for neglect of duty.

In the case of *Lambrou* v. *The Republic* (1982) 3 C.L.R. 379, it was held at pp. 386, 387:

> "Article 12.5 of the Constitution, in view of the manner in which it has been worded (see, inter alia, the word 'court' in sub-paragraph (e), as well as in view of its nature, is applicable only to criminal proceedings, and not, also, to disciplinary proceedings.
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> . . . . . .
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> A disciplinary charge is not, of course, a criminal charge; also, in view of the decisions of the Commission of Human Rights of the Council of Europe in cases 423/58 (see Collection of Decisions of the Commission No. 1) and 1931/63 (see Yearbook of the European Convention on Human Rights No. 7 at p. 212)".

Also, in *Georghiades* v. *The Republic* (1969) 3 C.L.R. 396, at p. 404 it was held:

> "In the light of the foregoing I cannot accept that the first part of paragraph (1) of Article 12 of the Constitution—with which, only, we are concerned at this stage—can, or should, be construed so as to render applicable to disciplinary matters concerning public officers the principle of nullum delictum sine lege (or, nullum crimen sine lege)."

In the circumstances of the present case I find that the action taken by the Chief of Police does not amount to a sentence within the ambit of paragraph 3 of Article 12 of the Constitution and therefore the sub judice decision does not violate the said Article.

Finally, I am coming to consider whether the Chief of Police has properly exercised his discretion under regulation 23 (f) (iii) of the Police (Discipline) Regulations Such regulation provides as follows:

> "(f) any such member, who having been interdicted from duty, returns to duty shall receive, as from the date of his interdiction, the pay and allowances to which he would have been entitled by virtue of the Police (General) Regulations, 1958, or any regulations amending or substituted for the same made under the Police Law, 1958, and then in force, but for his interdiction from duty, if -
>
> (i)
>
> (ii)
>
> (iii) he has been punished by withholding, stoppage or deferment of increment, a fine not exceeding ten days' pay, severe reprimand, reprimand or admonition, unless the Chief of Police directs that he shall not receive the said pay and allowances".

It has been held time and again by this Court that in accordance with well settled principles, the Court will not interfere with the discretion of any organ vested with same, if due weight has been given to all material factors, it has not been based on a misconception of fact and it was not exercised in abuse or excess of powers. Also that this Court will not substitute its discretion for that of the organ vested with such discretion when its exercise was a proper one. (See, inter alia, *Avgousti* v. *The Permit Authority* (1972) 3 C.L.R. 356; *Merck* v. *The Republic* (1972) 3 C.L.R. 548; *Kyriacou & Another* v. *The Public Service Commission* (1974) 3 C.L.R. 358; *Tsangaris* v.

The Republic (1975) 3 C.L.R. 518; *Republic* v. *Droushiotis* (1967) 3 C.L.R. 232).

In the present case I have come to the conclusion that it was reasonably open to the Chief of Police to arrive at the sub judice decision on the material before him and the applicant has failed to discharge the burden of satisfying the Court that the discretion of the Chief of Police was exercised in an improper way, or in excess or abuse of powers or that due weight has not been given to all material factors, or it was based on a misconception of law or fact in which case this Court might have been justified to interfere.

In the result, this recourse fails and is hereby dismissed. In the circumstances I make no order for costs.

Recourse dismissed.
No order as to costs.