1988 October 25

[STYLIANIDES, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

MICHALIS PANTIS,

Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH THE PUBLIC SERVICE COMMISSION,

Respondents.
(Case No. 259/87).

Legitimate interest—Free and voluntary acceptance of an administrative act—Deprives acceptor of legitimate interest to challenge it.

Executory act—Confirmatory act—New inquiry—Application for modification of terms of an offer of appointment turned down, because "according to legal advice of the office of the Attorney-General" the terms of the offer were correct—In the circumstances there has been no new inquiry—The decision is confirmatory.

The facts of this case appear sufficiently from the judgment of the Court.

Recourse dismissed.
No order as to costs.

Cases referred to:

Papadopoullou and Another v. C.B.C. (1987) 3 C.L.R. 1685;

Kyprianides v. The Republic (1982) 3 C.L.R. 611;

Spyrou v. The Republic (1983) 3 C.L.R. 354.

Recourse.

Recourse against the refusal of the respondent to modify condition 3 of the conditions of service of the offer of appointment.

A.S. Angelides, for the applicant.

A. Vassiliades, for the respondents.

Cur. adv. vult.

STYLIANIDES J. read the following judgment. The applicant was serving in the Department of Town Planning and Housing as from 8th September, 1980, on a casual basis. He was performing duties of Civil Engineer, but mainly the duties set out in the Scheme of Service for the post of Sanitary Engineer, Class II. On 8th July, 1983, he went on scholarship to Australia where he acquired the degree of "Master of Engineering Science in Sanitary Engineering and Environmental Control Engineering". He returned to the Republic and resumed his duties on 31st December, 1984.

The respondent Public Service Commission in pursuance of section 3 of the Casual Public Servants (Appointment to Certain Posts) Law of 1985, (Law No. 160/85) and on the Tables transmitted to them by the Director of Public Administration and Personnel on 3rd February, 1986, decided to appoint the applicant to the post of Sanitary Engineer, Class II, in the Department of Town Planning and Housing retrospectively as from 8th November, 1985.

By letter dated 13th February, 1986, offer was made to him for the appointment on probation to the aforesaid permanent post "according to the conditions of service attached". He was requested to inform, the soonest possible, the Commission whether he accepted the offer. The material part of condition 3 reads:

"3. *Salary*: The salary scale of the post is: A9: £2821 X 136

3909. The post of Sanitary Engineer "Υγειονομικού Μηχανικού", Class II is combined with the post of Sanitary Engineer, Class I, the salary scale of which is A11: £3759 X 152 - 4975; and A12: £4171 X 195 - 5536 (Combined Establishment)."

On 10th March, 1986, the applicant accepted in writing the offer. The material part of that letter reads:

"Αναφέρομαι στην επιστολή σας με αριθμό Π. 21225 και ημερομηνία 13.2.1986 με την οποία μου προσφέρετε διορισμό με δοκιμασία στη μόνιμη (Προϋπ. Αναπτ.) θέση Υγειονομικού-Μηχανικού, 2ης Τάξης και σας πληροφορώ ότι αποδέχομαι το διορισμό αυτό και σας ευχαριστώ.

Επιπρόσθετα σας εσωκλείω πιστοποιητικό Υπηρεσίας υπογραμμένο από τον Αν. Διευθυντή του Τμήματος Πολεοδομίας και Οικήσεως σχετικά με την προϋπηρεσία μου στο Τμήμα αυτό και παρακαλώ να καταχωρηθεί στον Προσωπικό μου Φάκελο."

On 19th March, 1986, he sent another letter to the Commission which reads as follows:

"Σε συμπλήρωμα της προς εσάς επιστολής μου ημερομηνίας 10ης Μαρτίου 1986, με την οποία αποδεχόμουν τον διορισμό που μου προσφέρετε με την επιστολή σας με αρ. Π. 21225 και ημερομηνία 13.2.1986, ζητώ όπως ο όρος (3) (Μισθός) τροποποιηθεί έτσι ώστε να ισχύσει και για μένα ακριβώς ότι θα ισχύσει και για τους συναδέλφους μου οι οποίοι διορίζονται στην θέση Λειτουργού Πολεοδομίας, 2ης τάξης στο Τμήμα Πολεοδομίας και Οικήσεως και έχουν προσληφθή στο Τμήμα τούτο (όπως κι' εγώ) πριν την αναδιάρθρωση.

Δηλαδή να μπορεί και στην δική μου περίπτωση (αφού προσελήφθηκα την 8ην Σεπτεμβρίου 1980) η μισθολογική μου κλίμακα να μπαίνει στην κλίμακα Π14.

Επιφυλασσόμενος όλων των νομίμων δικαιωμάτων μου, περιμένω απάντησή σας."

It is to be noted that the only difference between the scales A12 and Π14 is that the top of scale A12 is £5,536,-, whereas Π14 is £5,731.-, that is one annual increment more.

The Commission on 22nd May, 1986 asked for legal advice from the Attorney-General. In that letter of the Commission we read:

"Mr. Pantis by letter dated 10th March, 1986, copy of which is attached, accepted his appointment without any reservation. Later, by a new letter dated 19th March, 1986, he requested the Public Service Commission to modify condition 3 (Μισθός) (Salary) of the conditions of service so that when at a later stage he will be promoted to the combined post of Sanitary Engineer, Class I to be placed in scale Π14, as it applies to the other casual servants of the Department of Town Planning and Housing, who were appointed to the post of Town Planning Officers, Class II.

(c) It is relevant to mention that the fixing of the scale Π14 as the scale of the post of Town Planning Officer, Class I, was made in application of section 3 of the Public Officers (Conversion of Salaries and Arrangement of Other Matters) Law, 1981 (Law No. 22/81), that limits the posts for which it is applicable and the post of Sanitary Engineer, Class II is not included.

2. In view of the above you are hereby invited to give your opinion whether the conditions of service were correctly formulated by fixing the salary scale of the combined post of Sanitary Engineer, Class I in A11 and A12 and not Π14."

A senior Counsel of the Republic in a laconic manner replied:

"I am of the opinion that you correctly formulated the conditions of service."

The respondent Public Service Commission by letter dated 17th January, 1987, informed the applicant that his request for modification of condition 3 of the conditions of service of the offer of appointment could not be satisfied as, according to legal advice of the office of the Attorney-General, the condition of salary in the offer was correct.

Hence this recourse by means of which the applicant seeks the annulment of the act contained in the letter dated 17th January, 1987.

Counsel for the Respondents in his written address objected that the applicant has no legitimate interest to prosecute this recourse, because he unreservedly accepted the terms and conditions of the offer made to him.

Counsel for the applicant argued that this letter contains a new exectory act, as there was a new inquiry and there was a new decision which was taken after legal advice.

As provided by Article 146.2 of the Constitution, a person making a recourse must be one whose "any existing legitimate interest" is "adversely and directly affected" by the decision, act or omission which is challenged by the recourse.

In Revisional Jurisdiction Appeal No. 553. - *Phrini Papadopoullou and Aliki Fereou v. The Cyprus Broadcasting Corporation* (1987) 3 C.L.R. 1685) the appellants, employees of the respondent Corporation, were Announcers/Newsreaders (radio and television). Before 1st February, 1983, they held the post of Announcer/Newsreader of radio only and their salary scale was A6. On 13th January, 1983, the appellants were appointed to the permanent post of Announcer/Newsreader radio and television with effect from 1st February, 1983, in the salary scale of A8/9. They were given a number of increments and the salary of Papadopoul-

lou was £3,336.- and as from 1st July, 1983, £3,382.- and appellant Fereou was placed on £3,271.-. By letter dated 21st February, 1983, offers of appointment with detailed terms of service including date of commencement and salary, were given in writing to them. Appellants by letters dated 16th March, 1983, and 17th March, 1983, respectively accepted the offers on the terms set out in the said offers. By letter dated 8th April, 1983, they asked for their appointments to be made retrospective, at the latest as from 31st December, 1981 and for emplacement on scale A10, in order to be accorded equal treatment with their male counterparts, who had been emplaced on scale A10. That letter was not favoured with any reply. The appellants feeling aggrieved filed the recourse whereby they sought the annulment of the decision of the respondents to emplace them in the salary scale A8/9 instead of scale A10 and the refusal of the respondents to appoint them retrospectively. The Court dismissed their appeal and had this to say at pp. 1690-1691:

"For more than 20 years this Court repeatedly held that voluntary and unreserved acceptance of an administrative act or decision deprives the person concerned of a legitimate interest entitling him to file a recourse for an annulment under Article 146.2 of the Constitution. The acceptance may be expressed or implied. It must be free and voluntary, which it is not if it has been brought about by pressure of the prejudicial consequences of non-acceptance. (See *Paschali v. Republic* (1966) 3 C.L.R. 593, at pp. 603-604; *Piperis v. Republic* (1967) 3 C.L.R. 295; *Stefanos Ioannou and Others v. Republic* (1968) 3 C.L.R. 146 at p. 153; *Petros Antoniou v. Republic* (1968) 3 C.L.R. 452; *Costas Ioannou v. The Grain Commission* (1968) 3 C.L.R. 612, at p. 617; *Markou v. Republic* (1968) 3 C.L.R. 267; *Pericleous v. Republic* (1971) 3 C.L.R. 141 at p. 165; *Myriathis v. Republic* (1977) 3 C.L.R. 165; HadjiConstantinou and Others v. Republic (1980) 3 C.L.R. 184; *Tomboli v. CYTA* (1980) 3 C.L.R. 266 and on Appeal (1982) 3 C.L.R. 149; *Neocleous and Others v. Republic* (1980) 3 C.L.R. 497, at p. 508; *Stavros Aniliades v. CYTA* (1981) 3 C.L.R. 21; *Lefkos Georghiades v. Republic* (1981) 3 C.L.R. 431; *Zam-*

bakides v. Republic (1982) 3 C.L.R. 1017; *Goulielmos v. Republic* (1983) 3 C.L.R.883; *Stylianides v. Republic* (1983) 3 C.L.R. 672; *Ioannou and Others v. Republic* (1983) 3 C.L.R. 150; *Hadjiconstantinou and Others v. Republic* (1984) 3 C.L.R. 319; F.B. case, at p. 328; *Vlahou and Others v. Republic* (1984) 3 C.L.R. 1319, at p. 1322; *G. Michaelides v. Republic* (1984) 3 C.L.R. 1419, at pp. 1423-1424; *Mavrommatis and Others v. Republic* (1984) 3 C.L.R. 1006, at p. 1023; *Mavrogenis v. Republic* (1984) 3 C.L.R. 1140, at pp. 1148-1149; *Kalos v. Republic* (1985) 3 C.L.R. 135, at pp. 142-143; *Raftis Co. v. Municipality of Paphos* (1985) 3 C.L.R. 1664; *Nakis Bonded Warehouse v. Republic* (1985) 3 C.L.R. 1179; *Vrahimis v. Republic* (1985) 3 C.L.R. 2057; *Pierides v. Republic* (1985) 3 C.L.R. 1275, at pp. 1282-1283; *Chrysanthou and Others v. Republic* (1986) 3 C.L.R. 1128, F.B. case, at p. 1136; *Provita Ltd., v. Grain Commission of Cyprus* (1986) 3 C.L.R. 737; *Theodoros Papadopoulos v. Republic* (1986) 3 C.L.R. 1073, at p. 1083; *Republic v. Makaronopeion Carkotis* (1987) 3 C.L.R. 72.)

This principle is of universal application. It is well embeded in our administrative law. We see no reason to depart from it.

Having considered the content of the offers of appointment and the written acceptance by the appellants, and in the light of all relevant circumstances of this case, we are in full agreement with the trial Judge, that the acceptance of the aforesaid appointments was unreserved and free, and, therefore, by such acceptance the appellants have been deprived of legitimate interest in the sense of Article 146.2 of the Constitution, entitling them to file their recourse against the sub judice decision to appoint them with salary scale A8/9."

The above principle whereby acceptance of an administrative act precludes a person from challenging same before the Administrative Court, as deprived of a legitimate interest, does not apply when inalienable human rights are violated.

Does the letter of 17th January, 1987, contain a new executory act or is it a confirmatory act or decision of the Administration? It signifies the adherence of the Administration to the course already adopted; it is not in itself executory because it does not itself determine the legal position of the applicant and therefore it cannot be the subject of a recourse.

In *Kyprianides v. Republic* (1982) 3 C.L.R. 611, the following was said at pp. 619-620:

"It is well settled that a letter, which is merely of an informative nature and does not contain a decision creating a new legal situation, is not of an executory nature and, therefore, it cannot be made the subject-matter of a recourse under Art. 146. *(Economides v. Republic,* (1980) 3 C.L.R. 219; *Koudounaris v. The Republic*, (1967) 3 C.L.R. 479, 482; *Lardis v. The Republic,* (1970) 3 C.L.R. 356, 359; *HjiKyriacos and Sons Limited v. The Republic,* (1971) 3 C.L.R. 286, 290; *The Republic v. Demetriou,* (1972) 3 C.L.R. 219, 223; *Theodorou v. The Attorney-General of the Republic,* (1974) 3 C.L.R. 213; *HjiPanayi v. The Municipal Committee of Nicosia,* (1974) 3 C.L.R. 366, 375).

An act which contains a confirmation of an earlier one, may, however, be executory and therefore subject to a recourse for annulment if it has been made after a new inquiry into the matter. *(Kolokassides v. The Republic,* (1965) 3 C.L.R. 542; *Ktena and Another (No.1) v. The Republic,* (1966) 3 C.L.R. 64; *Varnava v. The Republic,* (1968) 3 C.L.R. 566, at p. 573).

When does a new inquiry exist? The answer is given by Stassinopoulos in The Law of Administrative Disputes, 1964, 4th edition, at p. 176, a passage which was adopted and applied by this Court in a number of cases:

'When does a new enquiry exist, is a question of fact. In general it is considered to be a new enquiry, the taking into

consideration of new substantive legal or factual elements, and the used new material is strictly considered, because he who has lost the time limit for the purpose of attacking an executory act, should not be allowed to circumvent such a time limit by the creation of a new act, which has been issued formally after a new enquiry, but in substance on the basis of the same elements. So, is is not considered as a new enquiry, when the case is referred afresh to a Council for examination exclusively on its legal aspect, or when referred to the Legal Council for its opinion or when another legal provision other than the one on which the original act was based is relied upon if there is no reference to additional new factual elements. There is a new enquiry particularly when, before the issue of the subsequent act, an investigation takes place of newly emerged elements or although pre-existing were unknown at the time which are taken into consideration in addition to the others, but for the first time. Similarly, it constitutes new enquiry the carrying out of a local inspection or the collection of additional information in the matter under consideration'."

(See, also, *Spyrou v. Republic* (1983) 3 C.L.R. 354.)

In the present case all the material was before the Public Service Commission. No new substantive legal or factual elements were considered. The respondent Commission simply put before the office of the Attorney-General the legal aspect of the case. They referred to the office of the Attorney-General for its opinion. In the circumstances, there was no new inquiry. The letter dated 17th January, 1987, does not contain an executory act and it cannot be made the subject of a recourse under Article 146 of the Constitution. The applicant lacks legitimate interest as defined in paragraph (2) of Article 146 because he unreservedly, freely and voluntarily accepted the decision of the Commission by his letter dated 10th March, 1986.

For the foregoing reasons, this recourse fails. It is hereby dismissed with no order as to costs.

Recourse dismissed.
No order as to costs.