

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

ANDREAS D.
DRYMIOTIS
v.
REPUBLIC
(PUBLIC
SERVICE
COMMISSION)

ANDREAS D. DRYMIOTIS,

Applicant,

and

THE REPUBLIC OF CYPRUS, THROUGH
THE PUBLIC SERVICE COMMISSION,

Respondent.

(Case No. 44/70).

Public Officers—Dismissal from service on the ground of absence from duty without leave—The Public Service Law, 1967 (Law No. 33 of 1967) section 60—Section 60 does not empower the Public Service Commission to disregard the procedure laid down by the said Law with regard to disciplinary proceedings—It follows, that the respondent Commission having disregarded in the present case the prescribed procedure, its decision to dismiss the applicant is null and void.

Statutes—Construction of—Section 60 of the Public Service Law, 1967.

This is a recourse under Article 146 of the Constitution whereby the applicant, a Specialist (Mental) in the Department of Medical Services, seeks to challenge the validity of the decision of the respondent Public Service Commission to dismiss him from the public service on the ground that he absented himself from duty without leave. The decision complained of was taken by the respondent Commission under the provisions of section 60 of the Public Service Law, 1967 (Law No. 33 of 1967) which reads as follows :

“ 60. Any officer who absents himself from duty without leave or who wilfully refuses or omits to perform his duties becomes liable to dismissal from the service ”.

It is common ground that in dealing with this case the respondent Commission did not follow the procedure laid down in the Public Service Law, 1967 for dealing with disciplinary offences (section 80).

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It was the case for the applicant that the failure of the Commission to follow the prescribed procedure renders the administrative act of his dismissal from the service null and void.

The Court agreed with this contention and annulled the subject decision.

Held, (1). In my view section 60 is merely a punitive section in the sense that it renders liable to dismissal from the service any officer who absents himself from duty without leave. But there is nothing either in this section or in any other part of the Law to show that it also enables the Commission to by-pass the prescribed procedure with regard to disciplinary proceedings. The contrary view would, I think, be contrary to the provisions of the Law and of the principles of natural justice.

(2) It follows that the decision complained of was taken in violation of the Public Service Law, 1967 and is, therefore, null and void.

Subject decision annulled.

No order as to costs.

Recourse.

Recourse against the validity of the decision of the respondent Public Service Commission to dismiss the applicant from the Public Service.

L. Papaphilippou, for the applicant.

L. Loucaides, Senior Counsel of the Republic, for the respondent.

Cur. adv. vult.

The following judgment* was delivered by:—

L. LOIZOU, J. : By this recourse the applicant, a Specialist (Mental) in the Department of Medical Services, challenges the validity of the decision of the respondents, the Public Service Commission, to dismiss him from the public service with effect from the 29th June, 1969. The decision challenged was taken by the Commission at its meeting of the 9th December, 1969. The minutes of the said meeting which relate to this decision have been produced in evidence and are *exhibit 11* in these proceedings. They read as follows :

“The Director, Department of Medical Services reports that Dr. Andreas D. Drymiotis, Specialist

* For final judgment on appeal see p. 400 in this Part *post*.

(Mental), left Cyprus for America on 1.6.69 after applying for and obtaining leave for the period 29.5.69 to 28. 6. 69. Before the expiration of his leave, Dr. Drymiotis informed his Ministry and Department that while getting ready to return he had suffered from 'ischyalgia' and that he had been kept in bed until the crisis was over. As Dr. Drymiotis neither informed his Department nor returned to duty, the Department of Medical Services tried to contact Dr. Drymiotis by telegram through the Cyprus Embassy in New York but in vain. To a personal letter addressed to him by his Head of Department on 11.9.69, Dr. Drymiotis replied on 11.10.69 requesting an extension of his stay in America for further studies in Medicine. By a personal telegram on 24.10.69, Dr. Drymiotis was requested to return to duty by 5.11.69 otherwise the Commission would be asked to terminate his services. Dr. Drymiotis replied by a telegram dated 5.11.69 that he would return the earliest. As Dr. Drymiotis has failed so far to return, the Director, Department of Medical Services requests that the services of Dr. Drymiotis may be terminated.

The Minister of Health has also addressed a similar letter to the Commission requesting the termination of Dr. Drymiotis' services.

As Dr. Andreas D. Drymiotis has failed to report for duty on the expiration of his leave and as the officer in question has failed to produce evidence that his continued absence from duty is due to medical grounds, the Commission decided that Dr. A. D. Drymiotis be dismissed from the service w.e.f. 29.6.69 for being absent from duty without leave or justification."

The salient facts are briefly as follows :

The applicant was appointed on the 16th December, 1965, on an unestablished basis to the post of Specialist (Mental) in the Department of Medical Services. As from the 1st November, 1966, he was appointed on a permanent basis and he held the post until the date of his dismissal.

On the 19th May, 1969, he applied for leave of absence to be spent in the United States of America. His application was approved. In the facts in support of the application it is stated that his leave was for the period 22nd May to 30th June, 1969, whereas from the documents of the Ministry of Health, which are *exhibits* in this case, it appears

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that it was from the 29th May to the 28th June, 1969. Although nothing very much turns on the date of the expiration of his leave, because it is not in dispute that the applicant overstayed his leave not by days but by months, it would appear that the correct date of the expiration of his leave is the 28th June ; this is clear also from applicant's own letter attached to *exhibit 7*.

Apparently sometime in June the applicant wrote to the Ministry of Health informing them that he was not feeling well and sometime later he sent two medical certificates, one dated 28th June, 1969, (the date of the expiry of his leave) and the other 15th August, 1969, to the effect that he was suffering from a Low-back Syndrome.

In view of applicant's silence and failure to return, the Acting Director of Medical Services on the 11th September, 1969, forwarded to him the letter *exhibit 4* inquiring about his health and requesting him to write to him. The applicant replied a month later asking for an extension of his stay in the U.S.A. so that he might follow a course. On the 24th October, 1969, the Ministry forwarded a telegram to the applicant in these terms :

“YOUR SERVICES AND THOSE OF YOUR WIFE URGENTLY REQUIRED IN CYPRUS STOP IF BOTH HAVE NOT RETURNED BY FIFTH NOVEMBER MINISTRY WILL BE COMPELLED TO ASK THE PUBLIC SERVICE COMMISSION TO TERMINATE YOUR SERVICES.”

On the 29th October, 1969, the applicant replied by telegram as follows :

“TELEGRAM RECEIVED TODAY WE RETURN BY EARLIEST BOAT S/S RAFAELLO DEPARTING NOVEMBER 5.”

The applicant did not board the s/s *Rafaello* on the 5th November, or at all, and it is his allegation that he did not do so because he was taken ill. In support of this counsel for the applicant produced the medical certificate *exhibit 3*. This certificate bears date 4th November, 1969, and is signed by a Peter Kambolis M.D. : it is to the effect that the applicant was, upon examination, found to have low back pain with muscular spasm and he was advised to remain in bed till complete relief of his symptoms.

On the 28th November, 1969, the Director of Medical Services wrote the letter *exhibit 9* to the Chairman of the

Public Service Commission setting out the history of the case and requesting that the services both of Dr. Drymiotis and his wife be terminated without any delay. By letter dated 8th December, 1969, (*exhibit 10*) the then Minister of Health makes the same request to the Commission.

On the 3rd December, 1969, the applicant sent the telegram *exhibit 5* to the Director of Medical Services. It reads as follows :

“HEALTH RESTORED RETURNING TO CONTINUE MY WORK PLEASE CONFIRM LETTER FOLLOWS.”

On December 5, the Ministry sent the following telegram (*exhibit 6*) to the applicant :

“DUE TO YOUR LONG UNJUSTIFIED ABSENCE AND YOUR FAILURE TO REPORT TO DUTY DESPITE THE FACT YOU WERE INFORMED THAT YOUR SERVICES WERE BADLY NEEDED THIS MINISTRY ASKED PUBLIC SERVICE COMMISSION TERMINATE YOUR SERVICES.”

As stated earlier on the 9th December, 1969, the Public Service Commission met and considered this case in the light of the information contained in the letter of the Director of Medical Services and the Minister of Health (*exhibits 9 and 10*) and decided to dismiss him from the service.

On the following day a letter (*exhibit 8*) was forwarded to the applicant informing him of his dismissal. It reads as follows :

«Ένετάλην νά σάς πληροφορήσω ὅτι κατηγγέλη εἰς τήν Ἐπιτροπήν Δημοσίας Ὑπηρεσίας ὅτι ἀπουσιάζετε ἐκ τοῦ καθήκοντος ἄνευ ἀδείας ἀπό τῆς 29ης Ἰουνίου, 1969. Ἡ Ἐπιτροπή ἔλαβεν ὑπ' ὄψιν τὸ γεγονὸς ὅτι δέν ἀνελάβετε καθήκοντα ἅμα τῇ ἐκπνοῇ τῆς ἀδείας ἀπουσίας σας καὶ ὅτι παρελείψετε νά παρουσιάσητε ἀπόδειξιν ὅτι ἡ συνεχῆς ἀπουσία σας εἶναι διὰ λόγους ὑγείας.

2. Ἐν ὄψει τῶν ἀνωτέρω καὶ ἔχουσα ὑπ' ὄψιν τὰς προνοίας τοῦ Ἄρθρου 60 τοῦ περὶ Δημοσίας Ὑπηρεσίας Νόμου ἀρ. 33/67, ἡ Ἐπιτροπή ἀπεφάσισεν ὅπως ἀπολύση, καὶ διὰ ταύτης ἀπολύει, ὑμᾶς ἐκ τῆς ὑπηρεσίας ἀπὸ τῆς 29ης Ἰουνίου, 1969, ἐπὶ τὸ ὅτι ἀπουσιάζετε ἐκ τοῦ καθήκοντος ἄνευ ἀδείας ἢ δικαιολογίας.»

It may be added that on the 6th December, 1969, obviously after he received the telegram *exhibit 6* the applicant

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wrote a letter (*exhibit 7*) to the Chairman of the Public Service Commission enclosing copy of a letter which he had earlier forwarded to the Director of Medical Services. However, this letter did not reach the Public Service Commission until the 15th December, 1969, *i.e.* six days after the meeting at which the decision complained of was taken.

It is common ground that in dealing with this case the Public Service Commission did not follow the procedure laid down in the Public Service Law (No. 33/67) for dealing with disciplinary offences.

It is the case for the applicant that the failure of the Public Service Commission to follow the prescribed procedure renders the administrative act complained of null and void.

Learned counsel appearing for the respondents in addressing the Court stated that "the procedure which led to the decision complained of started by a letter of the Director of the Department of Medical Services dated 28th November, 1969" "Further facts concerning the absence without leave of the applicant were submitted to the Public Service Commission by the Minister of Health in a letter dated 8th December, 1969" . "As a result of the facts stated in *exhibit 9* the Public Service Commission considered the case of the applicant on the 9th December, 1969 and decided to terminate his services".

When dealing with the legal aspect of the case learned counsel had this to say : "It is alleged that the decision should be annulled as there was no compliance with the provisions of section 80 of the Public Service Law in that the applicant was not charged as he should have been considering that the proceedings against him were disciplinary. In my submission the provisions of section 80 or any other provisions of the Public Service Law providing procedure for disciplinary offences are not applicable in the case of absence without leave and this in view of the express provisions of section 60 of the same Law. Because of the fact that this section makes specific provision for the dismissal of public officers who absent themselves without leave it is clear that its effect is to take out their case from the provisions regarding the procedure for disciplinary offences".

In further support of his argument learned counsel cited a passage from *La Fonction Publique et ses Problèmes Actuels* by Victor Silvera, 1969, p. 406, to the effect that the

jurisprudence of the *Conseil d'Etat* in France considers that in abandoning his service the public officer breaks the bond which unites him with the Administration and he is placed, by his own act, outside the field of the application of the laws and regulations enacted in order to guarantee the exercise of rights inherent to his employment. Before such case-law the Administration, relying on an advice of the Commission of the Public Service of the *Conseil d'Etat* considered the abandonment of post as a serious wrong justifying the putting in motion of the disciplinary procedure. - But the re-affirmation of the case-law depriving an officer guilty of abandonment of post of the disciplinary guarantees has led the government to prescribe the giving of an end to the previous practice and by a circular of the Prime Minister administrative authorities are invited to consider the public officer who is guilty of abandonment of post as having deliberately renounced the guarantees to which he is entitled in respect of his status.

The last paragraph of the passage cited reads : " However, according to the case-law, before the decision to strike out of the staff list is taken, a summons has to be addressed to the officer concerned inviting him to furnish his explanations and informing him of the measures to which he exposed himself by not complying with the order to resume his service or to take over his post which has been assigned to him ".

I do not think that I can derive much assistance from the passage cited in view of the express provisions of the Public Service Law which have to be applied.

Section 60 of the Public Service Law to which much reference has been made reads as follows :

" 60. Any officer who absents himself from duty without leave or who wilfully refuses or omits to perform his duties becomes liable to dismissal from the service."

The short issue in these proceedings is the construction and effect of this section and more particularly whether it empowers the Commission to disregard the procedure laid down in the Public Service Law with regard to disciplinary proceedings and deal with cases coming thereunder in the "summary" way that they have done in this case.

I find myself quite unable to accept this proposition. In my view section 60 is merely a punitive section, in the

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sense that it renders liable to dismissal from the service any officer who absents himself from duty without leave or who wilfully refuses or omits to perform his duties. But there is nothing either in this section or in any other part of the Law to show that it also enables the Commission to by-pass the prescribed procedure with regard to disciplinary proceedings. The contrary view would, I think, be contrary to the provisions of the Law and of the principles of natural justice.

In view of the conclusion that I have reached I must hold that the decision complained of was taken in violation of the provisions of the Public Service Law and is, therefore, null and void.

In the result this recourse must succeed and the decision complained of be annulled.

In the circumstances there will be no order as to costs.

*Decision complained of
is hereby declared null
and void. Order for
costs as aforesaid.*