1984 October 2

[SAVVIDES, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

THEMIS CHRISTODOULOU,

Applicant.

v.

1. THE CYPRUS BROADCASTING CORPORATION THROUGH ITS BOARD,
2. PROVIDENT FUND OF THE STAFF OF THE CYPRUS BROADCASTING CORPORATION THROUGH ITS COMMITTEE,

Respondents.

(*Case No.* 23/83)

Act or decision in the sense of Article 146.1 *of the Constitution—Which can be made the subject of a recourse thereunder—Only acts of administrative organs that come within the domain of public law are amenable to such a recourse—Provisions of a collective agreement lack the force of law and they have no application in the domain of public law unless adopted as part of the Regulations of a Public Corporation—Claim by employee of Public Corporation regarding basis of calculation of benefit out of a Provident Fund—Which arose from provisions of a collective agreement, between the corporation and Trade Union of its employees, that was not adopted as part of the Regulation of the Corporation—Does not come within the domain of Public law and its rejection cannot be made the subject of a recourse*

Industrial relations—Collective agreement—Has no application in the domain of public law.

The applicant in this recourse challenged the decision of respondent 1 to pay to him upon his retirement from its service the benefits of the Provident Fund calculated on the basis of the average of his last 36 salaries instead of on the basis of his

last monthly salaries. It was not in dispute that applicant's claim arose from a collective agreement between respondent 1 and the Trade Unions of its employees which was not made part of the Regulations of respondent 1.

On the preliminary objection, raised by counsel for respondent 1, that the sub judice act and/or decision could not be challenged by a recourse within the meaning of Article 146 of the Constitution in that such act and/or decision fell within the sphere of private and not of public law.

Held, that only those acts of administrative organs that come within the domain of public law are amenable to a recourse under Article 146 of the Constitution; that the provisions of a collective agreement lack the force of law in that, unless adopted as part of the Regulations of a public body, they have no application in the domain of public law; that since the sub judice claim arises from a provision which does not form part of the Regulations but part of a collective agreement, it does not come within the domain of public law and cannot, therefore, be entertained by this Court; accordingly the recourse must be dismissed.

Application dismissed.

Cases referred to:

Kontemeniotis v. *C.B.C.* (1982) 3 C.L.R. 1027 at p. 1032.

Recourse.

Recourse against the decision of the respondents to pay applicant upon his retirement from the service of respondent 1 the benefits out of the Provident Fund calculated on the basis of the average of his last 36 salaries instead of on the basis of his last monthly salary.

St. Nathanael, for the applicant.

P. Polyviou, for the respondents.

Cur. adv. vult.

SAVVIDES J. read the following judgment. The applicant, by this recourse, challenges the decision of the respondents or either of them to pay to him upon his retirement from the service of respondent 1 the benefits out of the Provident Fund calculated

on the basis of the average of his last 36 salaries instead of on the basis of his last monthly salaries.

The undisputed facts of the case are as follows:

The applicant, who was an officer of respondent 1, (having been appointed in 1952), retired on the 1st November, 1982, from the post of Director of the Music Department of the Cyprus Broadcasting Corporation, respondent 1, (hereinafter to be referred as C.B.C.).

Respondent 2 is the Provident Fund of the personnel of the C.B.C., established on the basis of section 12(d) of the Cyprus Broadcasting Corporation Law, Cap. 300A. In accordance with the Regulations of respondent 2, (exhibit 3), an officer of respondent 1 receives from respondent 2, upon his retirement, the benefit of the Provident Fund with which he is credited.

As a result of certain dispute that arose between C.B.C. and its officers, an agreement was reached on the 16th February, 1979, between the C.B.C. and the trade unions of its employees. One of the claims of the employees concerned the purchase value of the provident fund money to which the employees were entitled upon their retirement. It was agreed that a scheme should be adopted by the C.B.C., with regard to the calculation of the purchase value of that money, identical to the one which was to be adopted by the Electricity Authority of Cyprus, with retrospective effect so as to cover the cases of those who had retired since the 1st January, 1974 (exhibit 1B).

The aforesaid scheme of the Electricity Authority of Cyprus (E.A.C.) which was signed on the 15th December, 1979, provided that upon his retirement an officer would be paid by the Authority by way of securement of the purchase value of his money in the provident fund, "a sum not less than 15% of the average of his emoluments during his last 36 months of service, for each full month of contribution to the provident fund". (exhibit 1C).

This agreement was later incorporated on the 22nd January, 1980, into a collective agreement entitled "Collective Agreement between the Management of the Cyprus Broadcasting Corporation and the Union of Employees (EVRIC), the Trade Union of officers of Technical Services of the C.B.C. (SYTYRIC)

and the Federation of the semi-government Employees (SEK)", as clause 23 thereof (exhibit 1A). The above agreement was renewed on the 26th July, 1980, for one more year, without any change in clause 23.

Thereafter, negotiations started regarding the terms of the renewal of the agreement upon its expiration. In the course of these negotiations the employees of the C.B.C. submitted their claims to it through the Federation of their Trade Unions, on the 29th October, 1980. One of such claims concerned the calculation of the purchase value of the money in the Provident Fund (to which the employees were entitled upon their retirement) and was to the effect that such calculation should be made on the basis of the last salary instead of the average of the last 36 salaries of the employee. (exhibit 1H).

On the 28th February, 1981, a settlement was reached between the C.B.C. and the Trade Unions of its employees, regarding the further renewal of the existing agreement for one more year, till the 31st December, 1981, and which appears in the minutes of a meeting (exhibit 1 ST) entitled "Minutes of the Agreement between the Management and Employees of the C.B.C. regarding the Collective Agreement of 1981" dated the 2nd March, 1981. According to paragraph 2 of the above minutes "The claim as submitted is neither accepted nor rejected, but will be studied and considered again upon the expiration of the agreement. The C.B.C. undertakes to consider as special the cases of employees who retire during 1981".

In a supplementary agreement between the parties, signed on the same date, it is provided that:

> "The Unions will submit to the Corporation special cases of employees who retire during 1981 and the Corporation will treat these cases on the basis of the claim of the unions. This will not prejudice the outcome of the negotiations for the claim".

In compliance with such agreement payments were effected by the C.B.C. in the cases of five officers (two of whom have retired and three of whom had died during 1981) calculated on the basis of their last salary.

On the 30th October, 1981, in view of the forthcoming ex-

piration of the existing agreement, the Unions of the employees once again submitted their claims, claiming, inter alia, that the calculation of the purchase value of the Provident Fund money be made on the basis of the employee's last salary. These negotiations did not end up, until today, to any agreement.

The applicant, having retired on the 1st November, 1982, was paid the purchase value of his money in the Provident Fund, on the basis of the calculation of the everage of his last 36 salaries, which he accepted under protest, with reservation of his rights and filed, then, the present recourse.

The recourse was originally turned both against the C.B.C. and the Provident Fund. In the course of the hearing, however, and after the facts were agreed upon, it transpired that the Provident Fund had discharged all its obligations towards the applicant and the claim of the applicant concerned only the amount payable to him by the C.B.C. by way of securement of the purchase value of the money in the Provident Fund standing to his credit upon his retirement. As a result, the recourse against respondent 2, the Provident Fund, was abandoned.

Counsel for respondent 1 in support of his opposition raised a number of legal grounds, including the following preliminary objections:

1. The sub judice decision is not an executory one.

2. The sub judice act and/or decision cannot be challenged by a recourse within the meaning of Article 146 of the Constitution in that such act and/or decision falls within the sphere of private and not of public law.

By consent of both counsel the said two points of law were heard as preliminary points of law.

In dealing with the first point of law counsel for respondent 1 submitted that the recourse is premature in that the method of calculation of the purchase value of the money of the Provident Fund is still under consideration and no agreement has as yet been reached. As regards the second point, counsel contented that the securing of the purchase value of the money of the provident fund, is not an obligation of the C.B.C. provided for by any Law or Regulation and therefore has no legal basis. The claim, counsel submitted, arises only from the terms of the

collective agreement between the C.B.C. and the Trade Unions of its employees and since it is based on such collective agreement it cannot be made the subject of a recourse, but is within the domain of private law. He made, in this respect, reference to both Greek and Cyprus authorities on the point.

Counsel for applicant on the other hand, maintained that since the employees of the C.B.C. have the status of a public servant, any act or decision of the C.B.C. in connection with their status or conditions of service is prima facie taken in the context of its administrative duties and comes therefore within the domain of public law. It was further counsel's contention that the provident fund benefit provided for by the Regulations, constitutes part of the employees' remuneration and although the disputed amount is paid by the C.B.C. and not by the Provident Fund, it is closely connected with it and depends on its existence. It should therefore be considered also as part of the employee's remuneration, and is granted by the C.B.C. in the exercise of its administrative functions. Counsel further contended that applicant is not attacking the collective agreement but the decision of the C.B.C. not to offer him equal treatment. Counsel further submitted that by implementing this collective agreement the C.B.C. has accepted it as part of the Regulations and the case therefore comes within the ratio decidendi of *Kontemeniotis* case.

With regard to the objection that the recourse is premature, counsel for applicant maintained that the sub judice decision is not premature because there was a definite decision of the respondent affecting his interest and if he did not file a recourse within 75 days he would have lost his chance to test the validity of the decision of the C.B.C. The fact, counsel added, that a new collective agreement might be signed in the future, is immaterial.

I shall deal first with the question as to whether the act complained of is a proper subject of a recourse under Article 146.1 of the Constitution, and as such, subject to the jurisdiction of this Court. Article 146.1 of our Constitution, reads as follows:

> "1. The Supreme Constitutional Court shall have exclusive jurisdiction to adjudicate finally on a recourse made to it on a complaint that a decision, an act or omission

of any organ, authority or person, exercising any executive or administrative authority is contrary to any of the provisions of this Constitution or of any law or is made in excess or in abuse of powers vested in such organ or authority or person".

As a general rule an act or decision emanating from an organ of administration can be made the subject of a recourse for annulment. It is not, however, all such acts or decisions that can be made the subject of a recourse. Thus, it has been established, as a rule, that only those acts of administrative organs that come within the domain of public law are amenable to a recourse under Article 146 of the Constitution. There are certain acts that although emanating from an administrative body, come within the domain of private law and cannot be the subject of a recourse.

Public law regulates the relations between the state and its citizens, whilst private law relates to the residue of legal principles which concern the citizens in their relations to each other, together with those rules which are common to the State and its citizens. (See Z. M. Nedjatti on Administrative Law, 1974 Ed., p. 26). It is stated at page 109 of the same book that:

"It is well settled in Administrative Law that matters arising out of action taken by Government under contracts with citizens, are matters of private law, and as such they do not fall within the competence relating to the remedy by way of recourse for annulment".

It is not in dispute that applicant's claim arises from the agreement between the C.B.C. and the Trade Unions of its employees. It is not in dispute either that the above agreement is a collective agreement. What is disputed is whether, in the circumstances of the present case, the claim of the applicant should be treated as falling within the domain of public law.

The issue of whether collective agreements come within the ambit of public or private law was raised in the case of *Kontemeniotis* v. *The Cyprus Broadcasting Corporation* (1982) 3 C.L.R. 1027, where Pikis, J., in delivering the judgment of the Full Bench of this Court, said at p. 1032 that:

"However, in our judgment, the provisions of a collective

agreement lack the force of law in that, unless adopted as part of the regulations of a public body, they have no application in the domain of public law".

As I said earlier, there is no doubt that the agreement giving rise to the payment claimed by the applicant is a collective one. It is also a fact that the said agreement was not made part of the Regulations. The payment of the provident fund to the employees on their retirement is a matter regulated by the Regulations but the matter of securing the purchase value of the employees' money, is not one regulated by the Regulations. The matter was the subject of controversy between the C.B.C. and its employees and was finally settled by the agreement of the 22nd January, 1980, exhibit 1A which was for a certain duration, which has expired and the terms of its renewal are still under consideration.

As counsel for the applicant has put it, the employees of the C.B.C. have the status of a public servant, and any decision concerning their status or conditions of service is a matter of public law. The sub judice decision, however, does not concern either the status or the conditions of service of the applicant. But even if it did, again it does not cease to arise from the collective agreement and not the Law or the Regulations. In the *Kontemeniotis* case (supra) the appellant sought to annul the decision of the C.B.C. not to confirm him to the post of titler-interpreter, relying on a collective agreement between the respondent C.B.C. and the employees' Trade Union in breach of which the respondents failed to communicate to the appellant the contents of an evaluation report by his Departmental Head, and it was held that such breach constituted a matter of private and not public law, despite the fact that similar provisions existed in the Laws governing other public officers. It was held, in this respect, at pp. 1032-1033 of the *Kontemeniotis* case (supra) that:

"The fact that, allegedly, provisions comparable to Article 8 of the collective agreement found expression in the Public Service Law—s.45(4) of Law 33/67—and the Public Education Service Law—s.36(3) of Law 10/69, carries the case of the appellant no further. They derived their force from the law that enacted them..... If the legislature

intended to confer upon employees of the C.B.C. an opportunity to be heard before their non-confirmation to a post in which they serve on probation, they would have enacted a provision comparable to s.38(2) of Law 33/67, expressly enjoining the appointing body to communicate to the employee concerned its inclinations".

Since the sub judice claim arises from a provision which does not form part of the Regulations but part of a collective agreement, it does not come within the domain of public law and cannot, therefore, be entertained by this Court.

Another contention of counsel for applicant is that the disputed amount should be considered as part of the employees' remuneration. I entirely disagree with this view of counsel. The provident fund money which is governed by the Regulations may be considered as part of the employees' remuneration. The disputed amount, however, is only paid by the C.B.C. as a result of the aforementioned agreement and is rather in the form of an interest paid on the employees provident fund money, and cannot be regarded, in any way, as part of their remuneration, being only a security for the purchase value of their money.

As far as the argument of counsel that applicant is not attacking the collective agreement but the decision of the C.B.C. not to offer him equal treatment, this is utterly untenable. The decision not to pay to the applicant the amount claimed was not an arbitrary decision of the C.B.C. which acted in full furtherance of the agreement between itself and the trade unions. Furthermore, the decision of the C.B.C. cannot be separated from the collective agreement and, therefore, cannot be made the subject of a recourse.

Lastly, with regard to counsel's allegation that since the C.B.C. has implemented the collective agreement, it has accepted it as part of the Regulations, I find myself unable to accede to such view. The C.B.C. implemented the above decision in exactly the same way as a normal contracting party in private law. If there was any intention on its part to make it the subject of public law it would have taken steps to bring it formally within the Regulations.

Thus, on the authority of *Kontemeniotis* v. *C.B.C.* (supra) this recourse must be dismissed on the ground that it is not entertainable by this Court, as the sub judice decision is not an act or decision within the domain of public law.

Having concluded as above, I find it unnecessary to deal with the question as to whether the filing of this recourse is premature.

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

Recourse dismissed. No order as to costs.