1964
Sept. 4
1965
Jan. 12

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

CHARALAMBOS METAXAS,

Applicant,

and

THE REPUBLIC OF CYPRUS THROUGH

(a) THE COUNCIL OF MINISTERS

(b) THE MINISTER OF FINANCE,

Respondent.

(Case No. 143/63).

Administrative Law—Pension and gratuity—Elementary Education Law, Cap. 166, section 45—Duty allowance—Elementary schoolteacher (Headmaster), in receipt of duty allowance for a period of less than 5 years prior to the coming into operation of the Constitution of Cyprus—Decision to calculate pension and gratuity payable to him without taking into account such duty allowance, null and void.

Constitutional Law—Constitution of Cyprus, Article 192.5—Adding together of period of service before and after 16th August, 1960 applies also to periods of receipt of duty allowance.

Applicant, who had been a permanent schoolteacher, first appointed in 1927, retired on the 31st August, 1962. Since 1956, he became a 2nd Grade headmaster and, as a result, he was being paid an allowance of £96 per annum. By operation of the Constitution, as from the 16th August, 1960, his post came under the Greek Communal Chamber.

On the 23rd May, 1963, the Director of the Personnel Department informed Applicant of the amounts of gratuity and reduced pension, which were to be paid to him by the Government of the Republic—in respect of his service before the 16th August, 1960. Also on the 31st May, 1963, the Greek Communal Chamber informed Applicant of the gratuity and reduced pension to be paid to him in respect of service under the Chamber from the 16th August, 1960.

On the 1st June, 1963, Applicant replied complaining that his headmaster's allowance had not been considered as part of his pensionable emoluments and seeking to know the reasons for this course of action.

The Greek Communal Chamber, on the 22nd June, 1963, forwarded Applicant's complaint to the Director of Personnel recommending that Applicant's claim should be satisfied.

On the 25th June, 1963, Applicant was informed in writing, by the Personnel Department, that what he had been offered by the letter of the 23rd May, 1963, was what he was entitled to under paragraph 5 of Article 192 and that he was not entitled to whatever else he was asking for.

As a result, the Applicant filed this recourse by which he seeks a declaration that the decision to compute his pension and gratuity without taking into consideration the duty allowance, which he was receiving as a headmaster since 1st September, 1956, is null and void. He alternatively attacks the same action as an omission.

Held, (1) teachers continued to be, after the 16th August, 1960, in "public service", in the broad sense of the term. I am quite well aware that under section 108 of the Elementary Education Law, Cap. 166, it was provided that no teacher should be deemed to be a public officer, but the relevant terms, both in the said section 108 as well as in Articles 122 and 192(7) *(a)*, are used in their narrow technical meaning and not in their broad ordinary meaning, within which teachers fell both before and after the 16th August, 1960.

(2) Under Article 192(5), the continuity of service, regarding periods of service as a teacher before and from the 16th August, 1960, refers not only to the creation of the right to pension, gratuity or other like benefit, but also to the extent of such right, in the sense that service before the 16th August, 1960, which is by itself not sufficient to make a teacher eligible for enhancement of his pensionable emoluments by means of a duty allowance actually received by him immediately before the 16th August, 1960, may be added to any period of such service from the 16th August, 1960, for the purpose of completing the aggregate period

of service required under relevant legislative provisions, such as section 45 of Cap. 166.

(3) Section 45 of Cap. 166 envisages the exercise of a discretion by the appropriate authorities, for the purpose of enabling the enhancement of the pensionable emoluments of a teacher by means of a duty allowance. The gratuity and pension payable by the Republic under paragraph 5 of Article 192 have been computed on the basis of the view that under no circumstances the discretion in question could be exercised in favour of Applicant, because of the fact that by the 15th August, 1960, he had not completed an aggregate of five years' service in the post of headmaster.

(4) The appropriate authorities of the Republic have proceeded to act on the basis of an erroneous view of the effect of Article 192(5) viz. that it did not enable the Applicant to be considered as eligible for the benefit of the enhancement of his pensionable emoluments by means of his duty allowance as headmaster.

(5) The decision communicated to Applicant by the letter of the 23rd May, 1963, is hereby declared to be null and void as having been based on a misconception of law. The appropriate authorities will have now to reconsider the matter in the light of the effect of Article 192(5) as properly applicable.

(6) The alternative claim of Applicant complaining for an omission to calculate his headmaster's allowance as part of his pensionable emoluments cannot be entertained, as in this Case there has not been an omission to take action in the matter, on the part of the responsible authorities, but a refusal to enhance the said emoluments by adding thereto the headmaster's allowance. *Ozturk and The Republic,* 2 R.S.C.C. p. 35 at p. 41 and *Vafeadis and The Republic,* 1964 C.L.R. 454 followed.

(7) The claims of Applicant in respect of the financial consequences of the decision regarding Applicant's pension and gratuity, which has been already annulled, cannot by their very nature be the subjects of any separate order by this Court.

II. As to costs:

(a) Applicant should receive from Respondent part of his costs, which I fix at £15.

Decision complained of declared null and void.

Cases referred to:

Boyiatzis and The Republic, 1964 C.L.R. 367;

Ozturk and The Republic, 2 R.S.C.C. p. 35 at p. 41;

Vafeadis and The Republic, 1964 C.L.R. 454;

Recourse.

Recourse against the decision of the respondent to compute Applicant's pension and gratuity without taking into consideration the duty allowance which he was receiving as a headmaster since 1st September, 1956.

K. Michaelides for the applicant.

M. Spanos, Counsel of the Republic, for the respondent.

Cur. adv. vult.

The following Judgment was delivered by:-

TRIANTAFYLLIDES, J.: The Applicant in this Case seeks a declaration that the decision to compute his pension and gratuity without taking into consideration the duty allowance, which he was receiving as a headmaster since 1st September, 1956, is null and void. He alternatively attacks the same action as an omission. There are also consequential claims in respect of the financial consequences of the decision challenged.

The salient facts are that Applicant, who had been a permanent school-teacher, first appointed in 1927, retired on the 31st August, 1962.

Since 1956, he became a 2nd grade headmaster and, as a result, he was being paid an allowance of £96.- per annum.

By operation of the Constitution, as from the 16th August, 1960, his post came under the Greek Communal Chamber.

By letter of the 23rd May, 1963, the Director of the Person-

nel Department informed Applicant of the amounts of gratuity and reduced pension, which were to be paid to him by the Government of the Republic—in respect of his service before the 16th August, 1960. Also on the 31st May, 1963, the Greek Communal Chamber informed Applicant, by letter, of the gratuity and reduced pension to be paid to him in respect of service under the Chamber from the 16th August, 1960.

On the 1st June, 1963, Applicant replied complaining that his headmaster's allowance had not been considered as part of his pensionable emoluments and seeking to know the reasons for this course of action.

The Greek Communal Chamber, on the 22nd June, 1963, forwarded Applicant's complaint to the Director of Personnel recommending that Applicant's claim should be satisfied.

On the 25th June, 1963, Applicant was informed in writing, by the Personnel Department, that what he had been offered by the letter of the 23rd May, 1963, was what he was entitled to under paragraph 5 of Article 192 and that he was not entitled to whatever else he was asking for.

As it appears from the evidence given by Mr. Artemis, the Director of the Personnel Department, at the Presentation, it was originally intended to take into account the headmaster's allowance, in calculating the pensionable emoluments of Applicant, for the purpose of computing the pension and gratuity due to him by the Republic; this had actually been done in four other cases where the retired headmasters had not served, as such, for five years before the 16th August, 1960. But because of later obtained legal advice to the contrary, the computation in the said four cases was revised, by excluding from the calculation of pensionable emoluments the headmaster's allowance, and also Applicant's pensionable emoluments were calculated, likewise, without taking into account the said allowance.

Under section 45 of the Elementary Education Law, Cap. 166, as amended by Law 21 of 1959, "where a teacher has during the course of his service held posts in respect of which a duty allowance is payable for an aggregate period of not less than five years" it may be directed that such allowance may be taken into account, by enhancing accordingly the salary of such teacher, for purposes of computation of, inter

alia, pension and gratuity.

It is common ground that because the Applicant had not completed five years service as a headmaster by the 16th August, 1960, it was decided by the appropriate authorities, on legal advice as aforesaid, that for the purpose of computing the pension and gratuity payable by the Republic, under Article 192(5), the duty allowance could not be deemed to be part of the pensionable emoluments of Applicant.

It is to be observed that this recourse is only against the Republic and not against the Greek Communal Chamber. It concerns only the decision of the authorities of the Republic not to calculate the headmaster's duty allowance as part of the pensionable emoluments of Applicant, for the purposes of Article 192(5).

During the hearing the issue arose, incidentally, as to what are the emoluments which ought to be taken into account as being the pensionable emoluments for the purposes of Article 192(5). The Respondent held the view that such emoluments ought to be those of the 15th August, 1960, whereas the Applicant alleged that they ought to be those of the date of retirement. This issue has not, however, been raised in the present Case, as relevant to the validity of the sub judice administrative action, and, as it is already the subject of other proceedings pending before the Court and as the result of this Case will lead to computing afresh the pension and gratuity of Applicant, I am leaving it open. In any case Applicant was actually receiving the headmaster's allowance on the 15th August, 1960, immediately before the date of the coming into operation of the Constitution.

Paragraph 5 of Article 192 reads as follows:-

> "Any teacher who, immediately before the date of the coming into operation of this Constitution, was a serving teacher and was in receipt of remuneration out of the public funds of the Colony of Cyprus and whose office comes, by the operation of this Constitution, within the competence of a Communal Chamber, shall be entitled to receive from the Republic any retirement pension, gratuity or other like benefit to which he would have been entitled under the law in force before the date of the coming into operation of this Constitution in respect of the period of his service before such date if such period by itself or together with any period of service under such Commu-

nal Chamber would, under such law, have entitled him to any such benefit".

It has been submitted on behalf of Applicant that as he had completed an aggregate of five years' service as headmaster—before and after the 16th August, 1960—he should not be prejudiced by the fact that he had changed "employers", by operation of the Constitution, and lose thereby the benefit of having, under section 45 of Cap. 166, his salary enhanced by his duty allowance for the purpose of computing his pension and gratuity, payable under Article 192(5).

On the other hand, it has been submitted on behalf of Respondent that the adding up together of the periods of service before and after the 16th August, 1960 has been provided for in Article 192(5) only for the purpose of enabling a teacher to receive a pension, gratuity or other benefit and cannot be resorted to in order to determine also the extent of such benefit.

Paragraph 5 of Article 192 is a provision obviously intended to safeguard the accrued rights, arising out of service before the 16th August, 1960, in so far as "retirement pension, gratuity or other like benefit" are concerned.

It is reasonable to assume that it was not intended, under Article 192(5), either to grant to teachers any larger benefits, because of the fact that they came under either of the two Communal Chambers, or, on the other hand, to prejudice them, in any way, because of their new service status.

The true effect of Article 192(5) has also to be sought against the background of the whole concept of the creation of the Communal Chambers. They were created not as states within a State but as organs in one State, the Republic. To such organs certain functions of the State, such as educational matters, were entrusted.

Teachers, after the coming into existence of the Republic, have continued to be functionaries in the State, discharging a public service. As, however, teachers, even before the Republic, were in a class by themselves and were not to be used in any other office of the State, they were not given an option, under Article 192(4), such as was given to other officers whose offices came under the Communal Chambers.

In view of the aforesaid I am of the opinion that teachers

continued to be, after the 16th August, 1960, in "public service", in the broad sense of the term. I am quite well aware that under section 108 of the Elementary Education Law, Cap. 166, it was provided that no teacher should be deemed to be a public officer, but the relevant terms, both in the said section 108 as well as in Articles 122 and 192(7)(a), are used in their narrow technical meaning and not in their broad ordinary meaning, within which teachers fell both before and after the 16th August, 1960.

Is it proper, then, to hold that a teacher, a person in public service, who, as the Applicant, has been serving, at the material time viz. on the 15th August, 1960, as a headmaster and received a duty allowance for a number of years, should not be considered as eligible to be granted the corresponding benefit of such service and consequent allowance, for pension and gratuity purposes, merely because, through the supervening creation of a new State structure—which cannot be presumed as intended to be made to the prejudice of any person in public service—has been prevented from completing an aggregate of five years as headmaster either only before the 16th August, 1960, or only after it, but has completed such service from a point of time before, till a point of time after, the said date?

After careful examination of the matter I have reached the conclusion that this cannot be so, for the purposes at least of the provisions of Article 192(5), with which we are concerned in this Case. It is clear from such provisions that continuity of service is ensured to teachers in so far as the right to pension, gratuity or other like benefit is concerned, by adding on to a period of service before the 16th August, 1960—which would not by itself be sufficient to create the said right—the period of service from such date, so as to give rise to such right. In this respect it had to be decided by me whether to limit the effect of such continuity to the mere creation of the right to a pension, gratuity or other like benefit, or whether to treat it as applicable to the extent of such right as well, in so far as the said extent is related to the emoluments actually received immediately before the date of the coming into operation of the Constitution, the 15th August, 1960.

I saw no sufficient reason to adopt the former course. On the contrary, so long as the interpretation of Article

192(5), involved in the latter of the above two alternatives, is not excluded by the express words thereof, I am bound to adopt it, in view of its being consonant with the object of an enactment such as Article 192, which was obviously included in the Constitution for the purpose of protecting the interests of the members of the public services in Cyprus (see in this respect the Declaration of the Government of the United Kingdom of the 17th February, 1959, made in relation to the coming into existence of the Republic of Cyprus).

I have, therefore, reached the conclusion that, under Article 192(5), the continuity of service, regarding periods of service as a teacher before and from the 16th August, 1960, refers not only to the creation of the right to pension, gratuity or other like benefit, but also to the extent of such right, in the sense that service before the 16th August, 1960, which is by itself not sufficient to make a teacher eligible for enhancement of his pensionable emoluments by means of a duty allowance actually received by him immediately before the 16th August, 1960, may be added to any period of such service from the 16th August, 1960, for the purpose of completing the aggregate period of service required under relevant legislative provisions, such as section 45 of Cap. 166.

Any other construction would lead to differentiation between headmasters who had completed an aggregate of five years' service, as such, either before the 16th August, 1960, or from the said date, and headmasters, like Applicant, whose five years' service as headmasters stretched on both sides of the material date. The former would be eligible for corresponding enhancement of their pensionable emoluments under the provisions of section 45 of Cap. 166 whereas the latter—for no reasonable ground of differentiation but simply because of a change of sovereignty which could not have been intended to penalize them—would not be entitled to such enhancement. Such differentiation would contravene the principle of equality safeguarded under Article 28 and no express provision of the Constitution is to be found or has been relied upon warranting such contravention.

The interpretation of Article 192(5) which has been adopted in this Judgment is also in accordance with the realities of the situation to which it is to be applied—and the Supreme Court of Cyprus in deciding recently *Boyiatzis and The*

Republic (not yet reported)* appears to have left no room for doubt that Article 192 has to be applied with reference to the realities of the situation to which it is intended to be applied.

The realities of the sub judice situation are as follows:-

The duty allowance of a headmaster is in fact an increase in salary in return for increased responsibility. A headmaster who has served for an aggregate period of five years and has been receiving a duty allowance for the purpose, is rendered eligible under section 45 of Cap. 166 for increased pension and gratuity, by having such allowance taken into account for the purpose of ascertaining his pensionable emoluments. It cannot be denied that the benefit of such enhancement of the pensionable emoluments is directly related to the fact that during the said aggregate period of five years a headmaster has been shouldering increased responsibilities. I fail to see how, in the absence of express legislative provision for such a course,—which does not exist—it can be reasonably held that the intervening change of "employers", which took place on the 16th August, 1960, should prevent a headmaster, in the position of Applicant, from being considered eligible to be rewarded, through the appropriate enhancement of his pensionable emoluments, for increased responsibilities which he has in fact discharged for over five years since 1956.

The view that Article 192(5) entitles a headmaster, in the position of Applicant, to be considered as eligible for the benefit of enhancement of his pensionable emoluments, by means of his duty allowance as a headmaster, though he may not have completed till the 15th August, 1960, an aggregate of five years' service as a headmaster, still leaves the liability of the Republic, on this point, fixed by reference to the 16th August, 1960, because the relevant duty allowance was in fact being paid to Applicant immediately before the coming into operation of the Constitution, on the 16th August, 1960. In addition to this, the relevant legislation, section 45 of Cap. 166 was in force then; all that did not exist then was an aggregate of five years' service at the post in question, but this is made up by having the service from the 16th August, 1960, added to service before the 16th August, 1960,

*Now reported in 1964 C.L.R. 367.

in the manner envisaged by the concluding sentences of Article 192(5); since, by operation of the Constitution, it is only the "employing authority" that has changed, and not the nature of public service of Applicant, it was only proper that this should be so

Coming now to the outcome of the Case, in the light of the above reasoning. Section 45 of Cap 166 envisages the exercise of a discretion by the appropriate authorities, for the purpose of enabling the enhancement of the pensionable emoluments of a teacher by means of a duty allowance. It is to be reasonably inferred from all the circumstances of this Case, including the contents of the Opposition and the evidence of the Director of the Personnel Department, already referred to, that the gratuity and pension payable by the Republic under paragraph 5 of Article 192 have been computed on the basis of the view that under no circumstances the discretion in question could be exercised in favour of Applicant, because of the fact that by the 15th August, 1960, he had not completed an aggregate of five years' service in the post of headmaster

It follows, therefore, that the appropriate authorities of the Republic (the administrative action of which culminated in the decision of the Council of Ministers communicated to Applicant by the letter of the 23rd May, 1963) have proceeded to act on the basis of an erroneous—for the reasons already stated in this Judgment—view of the effect of Article 192(5) viz that it did not enable the Applicant to be considered as eligible for the benefit of the enhancement of his pensionable emoluments by means of his duty allowance as headmaster

In the circumstances the decision communicated to Applicant by the letter of the 23rd May, 1963 is hereby declared to be null and void as having been based on a misconception of law. The appropriate authorities will have now to reconsider the matter in the light of the effect of Article 192(5) as properly applicable I need hardly stress that this Judgment does not entitle the Applicant to an automatic enhancement of his pensionable emoluments by means of his duty allowance as headmaster, but only entitles him to a proper exercise of the relevant discretion under section 45 of Cap 166

The alternative claim of Applicant complaining for an omission to calculate his headmaster's allowance as part of his pensionable emoluments cannot be entertained, as in this

Case there has not been an omission to take action in the matter, on the part of the responsible authorities, but a refusal to enhance the said emoluments by adding thereto the headmaster's allowance. (See in this respect *Ozturk and The Republic*, 2 R.S.C.C. p. 35 at p. 41 and *Vafeadis and The Republic*, not yet reported).*

The claims of Applicant in respect of the financial consequences of the decision regarding Applicant's pension and gratuity, which has been already annulled by this Judgment, cannot by their very nature be the subjects of any separate order by this Court.

As regards costs, it is correct that Applicant has succeeded in this recourse but on the other hand the Republic has taken the course, which has been found to be erroneous, in a bona fide attempt to apply a rather complicated provision; no wilful disregard of Applicant's rights is involved. I, therefore, order that Applicant should receive from Respondent part of his costs, which I fix at £15.

Decision complained of declared null and void; order for costs as aforesaid.

*Now reported in 1964 C.L.R. 454.