[ZEKIA, P., VASSILIADES, TRIANTAFYLLIDES, MUNIR, JOSEPHIDES, JJ.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

IACOVOS LOUCAS AND OTHERS,

Applicants,

and

THE REPUBLIC OF CYPRUS THROUGH THE MINISTER OF HEALTH,

Respondent.

(Case Nos. 145/62, 152/62, 153/62 154/62—*Consolidated*).

Administrative Law—Public Officers—Upgrading or regrading of public posts and consequent conversion to new salary scales of such posts—Posts of Senior Pharmacist and Pharmacist, changed to post of pharmacist, 1st Grade, and Pharmacist, 2nd Grade, respectively—Changes not a case of "a general revision of salaries", but "an individual class revision"—Distinction between a general revision of salaries and individual class revision—Application of special rule of conversion, an act within the powers of Respondent.

Public Officers—Safeguard of rights existing prior to Independence—Practice and procedure in force for determining the salary of a public officer upon conversion pursuant to upgrading or regrading of his post, a matter within the expression "terms and conditions of service" within Article 192.1 of the Constitution.

Public Officers—Combined Establishment—No vacancy necessary for promotion from lower to upper grade.

All these consolidated Applications have arisen as a result of changes which were brought about by the 1962 Estimates, whereby the posts of Senior Pharmacists and Pharmacists were respectively changed to the post of Pharmacist, 1st Grade, and Pharmacist, 2nd Grade, and these posts were placed on a combined establishment.

All the Applicants in these consolidated Applications at the time of the filing of their respective recources held the post of Pharmacists, 2nd Grade, in the Medical Department.

The gist of the complaint of all Applicants is to the effect that "the act of the Respondent in giving one increment for every two years of past service instead of one increment for every one year of past service, in the new salary scales of Pharmacists is null and void and of no effect whatsoever".

Held, I. (a) The question of what is precisely saved by Article 192 of the Constitution and whether a particular matter falls within the expression "terms and conditions of service", as defined in paragraph *7(b)* of Article 192 of the Constitution is one which must be decided according to the nature of the particular matter under consideration.

(b) In this Case the Court is of the view that the practice and procedure, which was in force before the date of the coming into operation of the Constitution, with regard to determining the salary from one scale to another in the event of the upgrading or regrading of the post held by such public officer, falls within the expression "terms and conditions of service" in the sense in which such expression is used in paragraph 1 of Article 192.

(c) It cannot be said that the Respondent could not apply the particular Rules of Conversion which it has applied in this Case; and no grounds have been established to the satisfaction of the Court why the discretion of the Respondent, in so doing, should be interfered with.

(d) The application of the Rule of Conversion does not unjustly discriminate between the Pharmacists who have long service before the salary revision in question was made and those Pharmacists who have been or will be appointed after the said revision contrary to Article 6 of the Constitution, because when such appointments are made they are made, in all cases, having regard to the salary attaching to the post in question at the time of such appointment.

(e) The Applications of the Applicants in Cases Nos. 132/62, and 154/62 cannot succeed and are dismissed accordingly.

II. As regards the case of the Applicant in Case No. 145/62:-

(a) The decision to emplace Applicant in the top scale of Pharmacist, 2nd Grade, and to refuse to promote him

to Pharmacist, 1st Grade, because of the absence of a vacancy in such grade, has to be declared null and void having been reached through misconception of the correct legal position, namely, that in the case of all promotions from one grade to another in a combined establishment the existence of a vacancy is unnecessary.

(b) In view of the fact that this Applicant was deprived of the chance of having his case considered by the Public Service Commission before his retirement, due to no fault of his, this Court feels that the Applicant must be placed in no worse position than he would have been had his case been referred to the Public Service Commission, and that he should be given the benefit of any doubt as to how the Public Service Commission would have exercised their discretion with regard to the requirement as to serving on the maximum salary of the lower post of a "combined establishment" for a year, a practice which, as stated, was only followed "usually" but not invariably.

(c) Having given the Applicant the benefit of this doubt, the Court is of the opinion that the Application in Case No. 145/62 must succeed for this reason too.

Recourse in Case Nos. 152/62, 153/62 *and* 154/62 *dismissed. Recourse in Case No.* 145/62 *succeeds. Order accordingly.*

Observations: (1) *(a)* Having regard to the fact that the Applicant has retired in the meantime, and if thus it is too late for any appropriate authority to reconsider his case, then it is up to the authorities concerned to effect restitution to Applicant as envisaged by Article 146(6), as if his case had received proper consideration.

(b) It may be useful to stress in this connection that technicalities as to procedure or practice regarding pensions should not be considered as an obstacle in effecting restitution for Applicant in case such restitution is otherwise decided upon, so long as such procedure or practice is not laid down inflexibly by statutory provision, because there would be ample reason for the authorities concerned to depart from such technicalities in order to comply with the Judgment of this Court.

Recourse.

Recourse against the decision of the Respondent whereby the posts of Senior Pharmacist and Pharmacist, were respectively changed to the post of Pharmacist, 1st Grade, and Pharmacist 2nd Grade, respectively, and were placed on a combined establishment.

L.N. Clerides with G. Tornaritis for the applicants.

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

Cur. adv. vult.

The facts sufficiently appear in the judgment of the Court.

ZEKIA, P.: The judgment will be delivered by Mr. Justice Munir.

MUNIR, J.: All the Applicants in these consolidated Applications were, at the time of the filing of their respective recourses under Article 146 of the Constitution, Pharmacists in the public service of the Republic and were, immediately before the coming into operation of the Constitution, Pharmacists in the public service of the former Colony of Cyprus. At the time of the filing of their respective recourses all the Applicants held the post of Pharmacists, 2nd Grade, in the Medical Department.

All these consolidated Applications have arisen as a result of changes which were brought about by the 1962 Estimates, whereby the posts of Senior Pharmacists and Pharmacists were respectively changed to the post of Pharmacist, 1st Grade, and Pharmacists, 2nd Grade, on salary scales 8 (£720x30-900) and 10 (£570x24-690x30-720) respectively, and these posts were placed on a combined establishment. The salaries of the former posts were on salary scale 9 (£642x24-690x30-810) for the Senior Pharmacists and salary scale 12 (426x24-642) for the Pharmacists.

The salary scales of the Applicants were converted from the old scales to the new scales in accordance with the following Rule (hereinafter referred to as "the Rule of Conversion"):-

"Service of Pharmacists or Senior Pharmacists in their present grade up to the 31st December, 1961, to

count to the extent of one-half for the purpose of fixing their place in the new salary scales. For this purpose -

(i) Service in complete months only to be taken into account, fractions of month of service or of credit being ignored;

(ii) An officer will be deemed to have had so many years' service in his grade on the old salary scale as a person appointed prior to the 1st January, 1962, at the minimum of the old salary scale of the grade would require to reach that point in the old scale. For example, a Pharmacist who on the 31st December, 1961, was drawing £546 p.a. will be deemed to have had 5 years' service by the date from which he began to draw that salary.

Provided that no officer shall receive an increase in salary which is less than the amount of one increment in the new salary scale of his grade.

Provided further that no Pharmacist shall receive more than the maximum of the new salary scale of the grade of Pharmacist, 2nd Grade".

All the Applicants received similar letters from the Director of the Department of Medical Services dated 24th April, 1962, informing them that the title of their post had been changed from Pharmacist to Pharmacist 2nd Grade, with effect from the 1st January, 1962, and that their salaries had been revised with effect from the same date to the scale £570x24-690x30-720.

The case of the Applicant in case No. 145/62 (Iacovos Louka) differs from that of the other Applicants in these consolidated Applications in that this Applicant has retired from the Public Service since the filing of his recourse, with effect from the 31st December, 1962. Furthermore, this Applicant, who had also made representations regarding his being promoted to the post of Pharmacist, 1st Grade, received a letter from the Director of the Department of Medical Services dated 29th May, 1962, in which he was informed that there were no vacancies in the post of Pharmacist, 1st Grade, to which this Applicant could be promoted and that his request for such promotion "though justified" could not, therefore, be "met".

The gist of the complaint of all Applicants in these consolidated Applications, which is the subject matter of their respective motions for relief, is to the effect that "the act of the Respondent in giving one increment for every two years of past service instead of one increment for every one year of past service, in the new salary scales of Pharmacists is null and void and of no effect whatsoever".

In the opinion of the Court the question of what is precisely saved by Article 192 of the Constitution and whether a particular matter falls within the expression "terms and conditions of service", as defined in paragraph 7(b) of Article 192 of the Constitution is one which must be decided according to the nature of the particular matter under consideration.

In this Case the Court is of the view that the practice and procedure, which was in force before the date of the coming into operation of the Constitution, with regard to determining the salary of a public officer upon the conversion of such salary from one scale to another in the event of the upgrading or regrading of the post held by such public officer, falls within the expression "terms and conditions of service" in the sense in which such expression is used in paragraph 1 of Article 192.

In the case of a general revision of salaries i.e. where the salary structure of the whole of the public service is revised, the Court is satisfied that the practice which had been followed in such cases before the coming into operation of the Constitution was that a public officer should enter his new scale at the point he would have reached if the new scale had been in force since his appointment to the post in question. Where, however, the change of salary was due not to a general revision but to an upgrading or regrading of a particular post or group of posts (i.e. was an individual class revision as distinct from a general revision) it has been established to the satisfaction of the Court that the procedure then followed was the procedure laid down in Colonial Regulation 37 of the 1956 Edition of the Colonial Regulations which was, generally speaking, to the effect that, if an officer's old salary was less than the minimum of the new salary then the officer drew the minimum salary of the new post; if the old salary was not, however, less than the minimum of the new salary then the officer continues to draw his salary until, by length of service, he earns enough in-

crements which would bring his salary to the next incremental step in the new salary scale.

The Court is satisfied that the changes which were brought about by the 1962 Estimates in the titles and salary scales of pharmacists employed in the public service did not amount to a case of a "general revision of salaries" in the accepted sense but was an upgrading or regrading of the specific posts in question.

The particular procedure adopted in this Case for the conversion of the Applicants' salary from the old scale to the new scale was the new Rule of Conversion set out earlier in this judgment which was specially formulated and adopted for this purpose and which, while not being as advantageous as the rule of conversion applied in the case of a general revision of salaries referred to above, was, nevertheless, more advantageous to them than the rule which would appear to have been applicable before the coming into operation of the Constitution in the case of such an upgrading or regrading i.e. such individual revision, under Colonial Regulation 37 referred to above.

Having regard to all the circumstances of the Case, and in particular to the evidence given by the Director of the Department of Personnel, it cannot be said, in the opinion of the Court, that the Respondent could not apply the particular Rule of Conversion which it has applied in this Case; and no grounds have been established to the satisfaction of the Court why the discretion of the Respondent, in so doing, should be interfered with.

With regard to the submission made by the Counsel for Applicant that the application of the Rule of Conversion unjustly discriminates between the Pharmacists who had long service before the salary revision in question was made and those Pharmacists who have been or will be appointed after the said revision contrary to Article 6 of the Constitution, the Court is of the opinion that there is in fact no such discrimination because when such appointments are made they are made, in all cases, having regard to the salary attaching to the post in question at the time of such appointment.

For the reasons given above the Court is, therefore, of the opinion that the Applications of the Applicants in Cases Nos.

152/62, 153/62, and 154/62 cannot succeed and are dismissed accordingly.

With regard to the case of the Applicant in Case No. 145/62, however, having come to the conclusion that the Respondent was acting within its powers in applying the special Rule of Conversion which it did apply in this case, the question which next arises is whether this rule was properly applied in the particular case of such Applicant. As it appears in the letter addressed on the 29th May, 1962, to Applicant his claim for promotion at once to the first grade could not "be met", "though justified", because there were no vacancies in the post of Pharmacists, 1st Grade. It is correct that in the relevant decision which is recorded in Applicant's personal file and the effect of which was communicated by the letter of the 29th May, 1962, it is stated that he could not receive the salary of Pharmacist 1st Grade unless and until he had served on the maximum salary of the post of Pharmacist, 2nd Grade, for at least one year.

It is reasonable to treat the letter of the 29th May, 1962, emanating from the same authority which took the decision recorded in Applicant's personal file as containing one of the reasons for such decision, though such reason is not stated expressly in the relevant minute. After all, it must not be forgotten that in case of conversion of salaries it was the practice, according to the evidence of the Director of the Department of Personnel that an officer holding a post in the lower grade of a combined establishment might be promoted to the higher grade if he had served on the maximum salary of the lower post for a year, but according to the same evidence such practice was adopted "usually" which indicates that it could be departed from in a proper and deserving case.

There could be no doubt that this Applicant's case was proper and deserving in that he had been in public service for over 30 years and that he was due to retire within a year.

It is, therefore, reasonably probable, to say the least, that his Department having considered his claim for promotion to Pharmacist, 1st Grade as "justified" would have decided to meet it by departing from the above "usually" applied rule of conversion had it not laboured under the misconception that there ought to have existed a vacancy in the post of Pharmacist, 1st Grade.

The administrative action concerned, therefore, i.e. the decision to emplace Applicant in the top scale of Pharmacist, 2nd Grade, and to refuse to promote him to Pharmacist, 1st Grade, because of the absence of a vacancy in such grade, has to be declared null and void having been reached through misconception of the correct legal position, namely, that in the case of all promotions from one grade to another in a combined establishment the existence of a vacancy is unnecessary. But there is further reason why the relevant decision has to be annulled.

Had the Department concerned not misinformed the Applicant in the terms of the said letter of the 29th May, 1962, and had the Applicant been informed that as the posts of Pharmacist, 1st Grade, and Pharmacist, 2nd Grade, were a "combined establishment" it was not necessary for an officer holding the post in the lower grade of such a "combined establishment" to wait for a vacancy in the higher grade thereof, then the matter would, or could, have been brought before the Public Service Commission, either by the Applicant himself or by the Department concerned, before the retirement of the Applicant from the public service with effect from the 31st December, 1962.

Had the matter thus been brought before the Public Service Commission (as it should, or would have been, had it not been for the incorrect information given to the Applicant by the above-mentioned letter of the 29th May, 1962,) then it is reasonably possible that the Public Service Commission would have decided, in the exercise of its discretion, that, having regard to all the circumstances of this Applicant's case and particularly to the fact that he had served in the public service as a Pharmacist for over 30 years, and that he was due to retire by the end of that year, not to insist that the Applicant should serve on the maximum salary of the lower grade of the new "combined establishment" for a year. It is true that the Director of the Department of Personnel stated in evidence that "usually an officer holding a post in the lower grade of a combined establishment may be promoted to the higher grade if he has served on the maximum salary of the lower post for a year," it should be remembered, however, that the said witness, in describing this practice, qualifies it as being one which is "usually" adopted. This qualification would appear to suggest that in an appropriate and deserving case such practice was, and could be, waived.

In view of the fact that this Applicant was deprived of the chance of having this matter considered by the Public Service Commission before his retirement, due to no fault of his, this Court feels, having regard to the circumstances already stated, that the Applicant must be placed in no worse position than he would have been had his case been referred to the Public Service Commission, and that he should be given the benefit of any doubt as to how the Public Service Commission would have exercised their discretion with regard to the requirement as to serving on the maximum salary of the lower post of a "combined establishment" for a year, a practice which, as stated, was only followed "usually" but not invariably.

Having given the Applicant the benefit of this doubt, the Court is of the opinion that the Application in Case No. 145/62 must succeed for this reason too.

Having regard to the fact that the Applicant has retired in the meantime, and if thus it is too late for any appropriate authority to reconsider his case, then it is up to the authorities concerned to effect restitution to Applicant, as envisaged by Article 146(6), as if his case had received proper consideration.

It may be useful to stress in this connection that technicalities as to procedure or practice regarding pensions should not be considered as an obstacle in effecting restitution for Applicant in case such restitution is otherwise decided upon, so long as such procedure or practice is not laid down inflexibly by statutory provision, because there would be ample reason for the authorities concerned to depart from such technicalities in order to comply with the Judgment of this Court.

Recourses in Case Nos. 152/62, 153/62 *and* 154/62 *dismissed. Recourse in Case No.* 145/62 *succeeds.*

Order accordingly. No order as to costs.