1978 September 9

[TRIANTAFYLLIDES, P.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

ANDREAS EVANGELOU,

Applicant,

v.

THE ELECTRICITY AUTHORITY OF CYPRUS,

Respondent.

(*Case No* 242/76).

Time within which to file recourse—Article 146. 3 *of the Constitution—Running of time when person affected applies for administrative review—Principles of administrative law applicable—Article* 29 *of the Constitution—Recourse out of time because it was not filed within a period of seventy-five days after applicant had come to know of the* sub judice *decision and he did not apply for administrative review within the said period.*

Administrative Law—Administrative review—How it affects running of time under Article 146. 3 *of the Constitution—Principles of administrative law applicable—Applicant's letter for re-employment with respondent, after he had been informed of termination of his services, not an application for administrative review in the circumstances of this case.*

Administrative Law—Executory act—Confirmatory act cannot be made the subject of a recourse under Article 146. 1 *of the Constitution.*

By means of a decision of the respondent taken on September 17, 1974 the services of the applicant, who was in the employment of the respondent as a driver-workman, were treated as having been terminated on the ground that he had failed to return to his work after the expiration of his leave, which expired on August 8, 1974.

On August 1, 1974 the applicant, whilst at the U.S.A. applied for six months' leave without pay but his request was not granted. By letter of October 1, 1974 the respondent informed him

that his services were treated as having been terminated as from August 8, 1974. The applicant wrote to the respondent on January 29, 1975 and after complaining that he received no reply to his request of August 1, 1974 for leave without pay, he applied again for six months' unpaid leave adding that he was not accepting that his services could be terminated because had he known that his said request had been turned down he would have come back to his work.

There followed other correspondence between the parties and on June 8, 1976 the respondent wrote to the applicant once again, enclosing copies of letters addressed to him earlier (on March 11, 1975 and June 18, 1975) in which respondent stated that applicant's conduct amounted in effect, to resignation from his post and that, therefore, his services were being treated as having been terminated.

By letter of July 17, 1976, the applicant informed the respondent that he was not in agreement with the contents of the respondent's letter of June 8, 1976 and that he considered himself to be still an employee of the respondent. On July 19, 1976 he applied to be re-employed, repeating that he considered himself to be still an employee of the respondent and that he never resigned from his post. By a letter of July 30, 1976 the applicant was informed by respondent that his services were regarded as having been terminated as from August 8, 1974.

Applicant challenged the decision of the respondent to regard his services terminated as above by means of this recourse which was filed on October 9, 1976.

Counsel for the respondent raised the preliminary objection that the recourse was out of time on the ground that it has not been made within seventy-five days from the date when the *sub judice* decision came to the knowledge of the applicant, as provided by Article 146. 3 of the Constitution.

Counsel for the applicant submitted that the recourse has been filed within time, because the period of time prescribed under Article 146. 3 of the Constitution should be reckoned as having commenced on July 30, 1976, inasmuch as time had ceased to run against the applicant earlier because of the fact that he was continuously seeking a reconsideration of the *sub judice* decision.

Held, (1) *(after concluding that applicant must have received respondent's letter of October* 1, 1974 *by October* 31, 1974; *that*

the period of seventy-five days expired on January 14, 1975; *and that applicant's letter of January* 29, 1975 *could not be treated as an application for administrative review because it had not been made before the expiry of the seventy-five days period vide p. 166 post*): That having examined the present case in the light of the principles governing running of time when a person affected by an administrative decision applies for administrative review of the matter (vide p. 165 *post*), as well as other relevant principles of administrative law and of the provisions of Article 146. 3 of the Constitution, this Court has reached the conclusion that this recourse is out of time, because the applicant did not challenge the decision of the respondent, that his services were terminated, within a period of seventy-five days after he had come to know of such decision, by means of the letter of the respondent dated October 1, 1974 and he did not request a reconsideration of the decision within the said period.

(2) That, moreover, as by means of the letter of the respondent of June 8, 1976 applicant came to have full knowledge of the *sub judice* decision and yet he filed this recourse on October 9, 1976, that is well after the expiry of seventy-five days, his present recourse is again out of time by virtue of the provisions of Article 146. 3 of the Constitution.

(3) That though the applicant did, on July 19, 1976, write to the respondent seeking to be reemployed, the letter of July 19, 1976, cannot be treated as an application for administrative review, because it is clear from the contents of the letter of the respondent dated June 8, 1976 that the respondent had taken a final decision in the matter after having considered all the previous correspondence with the applicant, including his original application for leave without pay dated August 1, 1974 and because in reply to the letter of the respondent dated June 8, 1976 the applicant did not ask for any further consideration administratively of his case.

(4) That it is not possible to reckon the period of seventy-five days as from when applicant received the letter of the respondent dated July 30, 1976, because that letter is, obviously, not a letter communicating a decision of the respondent of an executory nature but only confirmatory of the previous decision of the respondent which had already been communicated to, and come to the knowledge of the applicant, and it is well established that no recourse can be made against a decision of a confirmatory

nature because such a decision lacks the attribute of being of an executory nature.

Application dismissed.

Cases referred to:

Mikrommatis v. *Republic*, 2 R.S.C.C. 125 at p. 129;

Case Nos. 1062/1967, 1775/1969, *and* 3506/1970 *of the Greek Council of State*;

Neophytou v. *Republic*, 1964 C.L.R. 280;

Ktenas and Another (*No.* 1) v. *Republic* (1966) 3 C.L.R. 64 at p. 73 (and on appeal (1966) 3 C.L.R. 820);

Varnava v. *Republic* (1968) 3 C.L.R. 574;

Zivlas v. *The Municipality of Paphos* (1975) 3 C.L.R. 349 at p. 360.

Recourse.

Recourse against the decision of the respondent to treat the services of the applicant, as a driver–workman, as having been terminated as from August 8, 1974.

A. Panayiotou, for the applicant.

P. Cacoyiannis, for the respondent.

Cur. adv. vult.

TRIANTAFYLLIDES P. read the following judgment. By this recourse the applicant challenges the decision of the respondent Authority to treat the services of the applicant as having been terminated as from August 8, 1974. According to the allegation of the applicant such decision was communicated to him by means of a letter dated July 30, 1976.

The recourse was filed on October 9, 1976. Counsel for respondent has raised the preliminary objection that this recourse is out of time on the ground that it has not been made within seventy-five days from the date when the *sub judice* decision came to the knowledge of the applicant. Of course, if the allegation of the applicant that the said decision was communicated to him on July 30, 1976, is correct, then the recourse is clearly within time. But, it is the contention of the respondent that such decision came to his knowledge much earlier and, in any event, not later than June 8, 1976.

The salient facts relevant to the determination of the issue

of whether or not this recourse was filed within time are as follows:

By means of a decision of the respondent taken on September 17, 1974, the services of the applicant, who was in the employment of the respondent as a driver-workman at Larnaca, were treated as having been terminated on the ground that he had failed to return to his work after the expiration of his leave; the applicant had left Cyprus for the U.S.A. on a month's leave in July 1974, and his leave expired on August 8, 1974.

The applicant had written to the respondent on August 1, 1974, stating that due to the situation prevailing in Cyprus—that is the situation created as a result of the Turkish invasion in Cyprus in the summer of 1974—he could not return to his work and he was asking for leave without pay for a period of six months.

The above request of the applicant for more leave was not granted and, as a result, his services were treated as terminated, as aforesaid. He was informed accordingly by letter of October 1, 1974, in which it was stated that the respondent had considered the matter of his having failed to resume his duties at the expiration of his leave on August 8, 1974, or at the latest by the end of August or at the beginning of September 1974, when the communications of Cyprus with abroad were re-established, and, therefore, his services were treated as having been terminated as from August 8, 1974.

The applicant then wrote to the respondent on January 29, 1975, referring to his previous request for six months' leave without pay, in respect of which he complained that he had received no reply; and he added that he was not accepting that his services could be terminated, because had he known that his said request had been turned down he would have come back to his work; therefore, he was asking again for a period of six months' leave without pay, that is up to August 6, 1975.

On March 11, 1975, the respondent replied to the applicant that his conduct amounted, in effect, to resignation from his post and that, therefore, his services were being treated as having been terminated.

On June 1, 1975, the applicant wrote to the respondent stressing that he had not received a reply to his aforementioned

letter of August 1, 1974, and he requested to be granted leave without pay for a period of two years, that is from August 8, 1974, until August 8, 1976.

By means of a letter dated June 18, 1975, he was sent by the respondent a copy of the letter addressed to him earlier on March 11, 1975, to which reference has already been made in this judgment.

Then on June 8, 1976, the respondent wrote, once again, to the applicant sending him a copy of the letter addressed to him earlier, as aforesaid, on June 18, 1975, together with a copy of the previous letter to him, of March 11, 1975; apparently, the said letters had been sent initially to the applicant by double registered post, but were returned to the respondent as not having reached the applicant.

By means of the aforementioned letter of June 8, 1976, there were sent to the applicant two cheques, one for the balance of emoluments still due to him, and the other for the amount which was payable to him from the Provident Fund of the employees of the respondent Authority. At the time, it appears that the applicant was still in the U.S.A., but later on, on July 17, 1976, having returned to Cyprus, he informed, by letter of that date, the respondent that he was not in agreement with the contents of the respondent's letter of June 8, 1976, and that he considered himself to be still an employee of the respondent, and he returned the two cheques which had been sent to him, as aforesaid.

On July 19, 1976, he applied, in writing, to be reemployed by the respondent at the post previously held by him, and he repeated that he considered himself to be still an employee of the respondent and that he had never resigned from his post.

By means of a letter dated July 30, 1976, the applicant was informed by the respondent "for the last time" that his services were regarded as having been terminated as from August 8, 1974, and that any further correspondence with him, in this connection would remain unanswered.

Counsel for the applicant has submitted that the present recourse has been filed within time, because the period of time prescribed under Article 146.3 of the Constitution should be

reckoned as having commenced on July 30, 1976, inasmuch as time had ceased to run against the applicant earlier because of the fact that he was continuously seeking a reconsideration of the *sub judice* decision of the respondent to treat his services as having been terminated.

It is a well settled principle of law that if a person affected by an administrative decision does not make at once a recourse against this decision, but seeks from the administrative organ which has reached it a reconsideration of the matter, this amounts to an exercise of his right to address a written request to the competent public authority—which right is safeguarded under our Constitution by means of Article 29—and, as a result, the time within which a recourse may be made against the decision complained of ceases to run.

The application, however, for reconsideration has to be made before the expiry of the period within which a recourse may be made against the decision concerned; and the time within which a recourse can be made commences to run afresh as from when either a reply is received or as from the expiry of the time—which under Article 29—is—thirty—days—within which a reply ought to have been given, in case no such reply is actually given (see Stasinopoulos on the Law of the Administrative Disputes—Στασινοπούλου, "Δίκαιον τῶν Διοικητικῶν Διαφορῶν" (1964), pp. 208, 209).

The above principles of administrative law have been applied in Cyprus in, *inter alia*, *Mikrommatis* v. *The Republic*, 2 R.S.C.C. 125, 129; and by the Decisions of the Council of State in Greece in cases 1062/1967 and 1775/1969.

Having examined in the light of such principles, as well as of other relevant principles of administrative law and of the provisions of Article 146.3, the present case, I have reached the conclusion that this recourse is out of time, because the applicant did not challenge the decision of the respondent, that his services were terminated, within a period of seventy-five days after he had come to know of such decision, by means of the letter of the respondent dated October 1, 1974; nor did he request a reconsideration of the decision within the said period.

In his letter dated January 29, 1975, he admits having re-

ceived the said letter of October 1, 1974, and though I am prepared to give to the applicant the benefit of any reasonable doubt as regards the exact date when he actually received such letter (see, *inter alia*, *Neophytou* v. *The Republic*, 1964 C.L.R. 280), I am bound to conclude that he must have received it, in the ordinary course of events, well before the expiry of seventy-five days as from the end of October 1974, having allowed, in this respect, about a month within which, at that time, the letter of the respondent dated October 1, 1974, was bound to reach the applicant in the U.S.A. So, even assuming that the applicant received the said letter by October 31, 1974, at the latest, the relevant period of seventy-five days expired on January 14, 1975, and his letter dated January 29, 1975, cannot be treated as an application for administrative review of the decision to treat his services as having been terminated, which was made within the period of seventy-five days prescribed by Article 146.3 of the Constitution, and which had it been so made it would have had the effect of suspending the running of time in relation to such period, pending either a reply to the letter of the applicant dated January 29, 1975, or until the expiry of the period of thirty days prescribed under Article 29 of the Constitution, whichever of the two happenings would occur earlier.

I have said, earlier on, that the applicant must have received the letter of the respondent dated October 1, 1974, at the latest by the end of October 1974, because from a respondent's letter of March 11, 1975, it appears that a letter of the applicant dated August 1, 1974, and posted from the U.S.A. on August 13, 1974, was received by the respondent on August 25, 1974; so, even though the applicant contends that he never received the respondent's letter dated March 11, 1975, it is legitimate to rely on the dates stated therein concerning the fate of his letter dated August 1, 1974, in order to deduce approximately how long it would take, at that time, for a letter to travel from the U.S.A. to Cyprus and vice versa.

Even if, however, I were to assume that the applicant received the letter of the respondent dated October 1, 1974, so belatedly that his application for an administrative review of the *sub judice* decision of the respondent, which he had put forward by means of his letter of January 29, 1975, was made within a

period of seventy-five days after he had come to know of such decision, with the result that the time prescribed under Article 146.3 of the Constitution ceased running against him, and even if I were to accept, further, that the applicant never received not only the letter of June 18, 1975—which actually he did not receive (see the letter of the respondent dated June 8, 1976—but, also, the letter of the respondent dated March 11, 1975, it is not disputed that he did receive the letter of the respondent dated June 8, 1976, to which he replied by means of a letter dated July 17, 1976.

By means of the said letter of the respondent of June 8, 1976, the applicant came to have full knowledge of the *sub judice* decision and yet he filed the present recourse only on October 9, 1976, that is well after the expiry of seventy-five days, and, therefore, his present recourse is out of time by virtue of the provisions of Article 146.3 of the Constitution.

Though the applicant did on July 19, 1976, write, once again, to the respondent seeking to be reemployed in the service of the respondent I cannot treat his letter of July 19, 1976, as an application-for-administrative-review, because it is clear from the contents of the letter of the respondent dated June 8, 1976, that the respondent had taken a final decision in the matter after having considered all the previous correspondence with the applicant, including his original application for leave without pay dated August 1, 1974; and, actually, in reply to the letter of the respondent dated June 8, 1976, the applicant did not ask for any further consideration administratively of his case, but some days later, on July 19, 1976, he put forward in writing a request which, apparently, he had made orally on July 17, 1976, not for a reconsideration of the decision to treat his services as having been terminated, but only for reemployment by the respondent.

It is not possible to reckon the period of seventy-five days within which a recourse could have been filed against the final decision of the respondent in the matter of the termination of the applicant's services as from when he received the letter of the respondent dated July 30, 1976, because that letter is, obviously, not a letter communicating a decision of the respondent of an executory nature, but only confirmatory of the previous decision of the respondent in the matter, which had already

been communicated to, and come to the knowledge of, the applicant, at the latest when he received the letter of the respondent dated June 8, 1976, if not earlier when he received the letter of the respondent dated October 1, 1974.

It is well established that no recourse can be made against a decision of a confirmatory nature, because such a decision lacks the attribute of being of an executory nature (see *Ktenas and Another (No. 1)* v. *The Republic*, (1966) 3 C.L.R. 64, 73, and, on appeal, (1966) 3 C.L.R. 820, *Varnava* v. *The Republic* (1968) 3 C.L.R. 566, 574, *Zivlas* v. *The Municipality of Paphos*, (1975) 3 C.L.R. 349, 360; and the decision of the Council of State in Greece in Case 3506/1970).

For all the foregoing reasons this recourse is obviously out of time and has to be dismissed as such, but bearing in mind all relevant considerations I have decided to make no order as to costs against the applicant.

Before concluding I would like to point out that at no time has the applicant contended that he has been prevented from filing the present recourse within time either by force majeure or by any other reason which would have prevented time running against him.

Finally, I should observe that it has not become necessary for me to hear any evidence on disputed issues of facts related to the question of whether this recourse was filed within, or out, of time, because on the basis only of admitted, or indisputable, facts it is clear that it is, indeed, out of time.

Application dismissed.
No order as to costs.