1979 March 28

[A. Loizou, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

MARIOS CHRISTOFIDES,

Applicant,

v.

CYPRUS TELECOMMUNICATIONS AUTHORITY,

Respondent.

(*Case No.* 85/77).

Legitimate interest—Article 146. 2 *of the Constitution—Legitimate interest must exist both at the time of filing and hearing of a recourse—These requirements satisfied where such interest, though not yet actually adversely and directly affected is unavoidably bound to be so affected eventually—Reservation of rights by a person affected by an administrative act—Whether it preserves the legitimate interest—Recourse against decision imposing punishment of reduction in grade and fine—Applicant paying the fine and resigning his post but reserving his rights to seek annulment of punishment and pursue his reinstatement to his previous post—He possesses a legitimate interest under the above Article because his pecuniary interest was and continued to be affected at the time of the hearing since by the* sub judice *decision he was ordered to pay a fine—Moreover by his resignation he has not consented to or accepted the* sub judice *decision because he resigned with reservation of rights.*

Administrative Law—Hierarchical recourse or appeal—Nature of—Appeal to the Board of the respondent Authority from decision of General Manager—Section E of the Internal Rules of the Cyprus Telecommunications Authority—No restrictions or limitations to the powers of the Board in entertaining such an appeal—Its discretion an unfettered one and can exercise its discretion in the place of that of the subordinate organ—It has power to re-examine from the beginning the whole case.

Natural Justice—Bias—Where there is any suggestion of bias in an

Administrative Tribunal the Court on Judicial review would look more critically at the Tribunal's findings—And where the only Tribunal empowered to act in a controversy is allegedly biased, the Tribunal still has jurisdiction since the alternative is non-enforcement of the Law—Doctrine or Law of necessity—Hierarchical recourse or appeal to superior organ from decision, in a disciplinary trial, of subordinate organ which was allegedly biased, but which was the only tribunal empowered to act—Subordinate organ duly tried applicant in the first instance—And superior organ very rightly decided to try case as a whole in view of the allegations of bias.

Administrative Law—Misconception of fact—Prerequisites for its existence.

Administrative Law—Administrative decision—Reasoning.

Equality—Principle of equality—Uniformity of sentences in disciplinary proceedings—Whether possible to apply principle of equality in cases where different sanctions or sentences are imposed.

Disciplinary offences—And disciplinary convictions and punishments—Recourse under Article 146 *of the Constitution—Whether Court can interfere with the subjective evaluation of relevant facts as made by the appropriate organ—And whether severity as such of a disciplinary sanction can be tested and decided upon by means of such recourse.*

The applicant, who at all material times was the Chief Accountant or Director Economic services of the respondent Authority, was tried by the General Manager of the Authority of certain disciplinary offences and was found guilty of, *inter alia*, acts incompatible with his position as an employee of the Authority and of unbecoming conduct towards the General Manager and degrading of his Authority.

After the commission of the offences the applicant was suspended from duty and a Board of investigation, consisting of three officers of the Authority who were senior to applicant, was set up by the General Manager for the purpose of enquiring into these offences. The findings of the Board together with all relevant documents were forwarded to the General Manager on July 14, 1976, who, after finding the applicant guilty as above, imposed on him the punishment of dismissal from the Authority.

As against this decision the applicant filed an appeal to the Board of the respondent Authority. In view of the allegations of the applicant that the General Manager was biased, because he was a person directly affected by the behaviour of the applicant, the Board decided "to try as a whole the case relying on all the elements which are before it without being influenced by those parts of the decision of the General Manager which are challenged by the present appeal on the ground that he was personally involved, which it completely ignores". The Board further stated that it followed such a course "as it realises that the procedure before it constitutes re-examination of the case on the basis of the minutes and *exhibits* which present the procedure so far". (See the decision of the Board at pp. 107–112 *post*).

After considering the Minutes of the Board of investigation, the exhibits, the address of counsel for the appellant before the General Manager and before it and what was stated by the applicant before it in his defence, the Board found that they were really sufficient in order to form an opinion and that it did not need to re-examine any witness or call additional witnesses. It then proceeded to make certain findings (see pp. 109–112 *post*) and on the basis of such findings it dismissed the appeal of the applicant against his conviction by the General Manager. Regarding the sentence of dismissal the Board found that it was excessive and decided to substitute it by the following punishment:

(a) Reduction in grade to the immediately lower post from the one held and without a right to assume the duties of acting Chief Accountant.

(b) As fine the loss of half of his remuneration from 19 June, 1976, the date on which he was placed on suspension, until the 31st December, 1976.

(c) The refund by applicant of any amount which he received from the Provident Fund or otherwise from the Telecommunications Authority of Cyprus.

After communication to the applicant of the decision of the Board he was asked by letter dated December 31, 1976 to assume his duties as from the 3rd January, 1977. The applicant replied that he had given instructions for the filing of a recourse, under Article 146 of the Constitution, against the decision of the

Board and as he was considering that decision as *null* and *void* it was impossible for him to return and assume the duties of Assistant Director, Economic Services, though he would be prepared to assume his previous duties as Director. The applicant was called once more to assume his new duties by January 31, 1977, otherwise his services would be considered as terminated on the ground of persistent refusal to assume duties with the respondent Authority. Applicant replied, through his counsel, by letter of January 29, 1977, that as he was considering himself unjustifiably pressed he decided to submit "under pressure and duress" his resignation from the respondent Authority reserving at the same time fully his rights to seek the annulment of the decision of the Board, as well as his right to seek through appropriate legal measures his reinstatement to the post legally held by him

As against the decision of the Board applicant filed the present recourse on March 12, 1977, that is after his resignation as above stated.

The proceedings before the General Manager and the Board were governed by Section E of the Internal Rules of the respondent Authority which, after their amendment*, on the 12th December, 1975, give express power to the General Manager to try, determine and impose the appropriate punishment in disciplinary offences, as a Tribunal of first instance, with power to the Board to entertain such cases as an appeal Tribunal if the officer affected challenges the decision of the General Manager.

Counsel for the applicant mainly contended

(1) That the *sub judice* act and/or decision and/or the procedure followed constitute a violation of the rules of natural justice inasmuch as the General Manager, whose decision was the subject of appeal to the Board, acted as a Judge, prosecutor and witness, although one of the charges against the applicant was for unbecoming conduct towards him.

(2) That the *sub judice* act and/or decision and/or the procedure followed was taken in abuse and/or excess of

* The Rules were amended following the decision of the Supreme Court in *Cleanthous v. C.Y.T.A.* (1974) 3 C.L.R. 461

power and/or contrary to the general principles of Administrative Law in the sense that:

(a) it was not duly and/or sufficiently reasoned;

(b) there was misconception of fact; and

(c) facts were taken into consideration which should not have been so taken.

(3) That the procedure and/or material parts which led to the taking of the *sub judice* decision constituted violation of several regulations of the respondent Authority namely rules 1(a) and (b), 3, and 5(a) of Section (E) of the Internal Rules.

(4) That the *sub judice* act and/or decision was taken in abuse and/or excess of power and/or was illegal and this on account of the fact that the Board of the respondent Authority which tried the said appeal acted on a misconception of Law when deciding that it could act as a Court of first instance and not as an appellate Court; by this action and in conjunction to the fact that the General Manager could not try the applicant by virtue of the rules of natural justice, the applicant was substantially deprived of his right of appeal.

(5) That the *sub judice* act and/or decision was taken in abuse and/or excess of power inasmuch as the verdict of guilt reached against the applicant was unreasonable and/or unfounded and/or the punishment imposed excessively harsh and cruel.

(6) That the *sub judice* act and/or decision was contrary to Article 28 of the Constitution and generally to the principle of equality, because in other cases where officers of the respondent Authority were found guilty of more serious offences than those attributed to the applicant, lighter punishments were imposed.

Counsel for the respondent raised the point that the applicant does not possess a legitimate interest in the sense of Article 146. 2 of the Constitution and that in any event there could be no reservation of right in the circumstances as a valid principle of Administrative Law that could safely be relied upon by the applicant;

and argued, by relying on *Christofis* v. *Republic* (1970) 3 C.L.R. 97 and on Case No. 1823/56 of the Greek Council of State, that the legitimate interest required must exist both at the time of the making of an act and at the time when its validity is challenged and it must arise out of a legal relationship of an applicant which is already in existence when the act concerned is challenged.

(I) *On the question whether applicant possessed a legitimate interest in the sense of Article* 146. 2 *of the Constitution*:

Held, (1) that though the presence of existing legitimate interest is essential to the exercise of a right of recourse under Article 146 of the Constitution; and that though the word "existing" in Article 146. 2 denotes that it must exist at the time of the filing and the hearing of a recourse these requirements are satisfied also in cases where at the material time it is clear that the existing interest of an applicant, though not yet actually adversely and directly affected, is unavoidably bound to be so affected eventually.

(2) That as the pecuniary interest of the applicant was and continued to be affected at the time of the hearing of this recourse, since by the *sub judice* decision he was adjudged to pay a fine and this fine was collected by the respondent Authority, he possesses a legitimate interest in the sense of Article 146. 2 of the Constitution.

(3) That, moreover, the reservation of rights by a person affected by an administrative decision preserve his legitimate interest in the matter and render ineffective anything that might otherwise have been considered as an acceptance of the administrative act complained of; that the applicant resigned with reservation of his rights and made it clear that he intended to pursue his reinstatement; that by his act of resignation he has not consented to or accepted the *sub judice* decision; and, that, accordingly, his legitimate interest has not been lost because of any acceptance of the *sub judice* decision.

(II) *On the merits*:

Held, (1) that appeals or recourses for administrative review to hierarchically superior authorities or organs are frequently prescribed by Laws and Rules as a means of affording the citizen the opportunity of examining the legality of an administrative

act and the re-examination of his case by the administration by the powers of such superior organs which are usually regulated by law or Regulations; that, in this case, there are no restrictions or limitations to the powers of the Board, the hierarchically superior organ of the respondent Authority in entertaining an appeal to it from the decision of a subordinate organ; that its discretion in the matter is unfettered and no doubt it can exercise its own discretion in the place of that of the subordinate organ; that it has power to re-examine from the beginning the whole complaint and this is what was done in the present case in particular of the allegations of prejudice or bias on the part of the General Manager.

(2) That where the only Tribunal empowered to act in a controversy is allegedly biased, the Tribunal still has, by virtue of the doctrine of necessity, jurisdiction since the alternative is non-enforcement of the law.

(3) That though where there is any suggestion of bias in an administrative Tribunal the Court on Judicial review would look more critically at the Tribunal's findings, the Board of the respondent Authority, very rightly decided "to try as a whole the case", in view of the allegations of the applicant that there was bias or likelihood of bias.

(4) That the rank of the applicant was such that there was nobody superior to him to try his case in the first instance other than the General Manager himself; that all the officers senior to applicant were members of the Board of Investigation and the Board of the respondent Authority remained uninvolved in the matter until it was brought to it at the instance of the applicant on appeal; that the applicant was duly tried in the first instance by the General Manager and he exercised himself the right of appeal given to him by the statutory regulations of the Authority; and that, accordingly, contentions 1, 3 and 4 must fail.

(5) That for the existence of a misconception of fact there is required an objective non-existence of the actual circumstances and prerequisites upon which the act is based which is answered in the absence of the element of the subjective test; that misconception of fact, put forward as a ground of annulment, is groundless since the objective non-existence, cited by the applicant, of the acts referred to in the decision against which the re-

course is directed has not been ascertained; and that, moreover, an administrative Court in dealing with a recourse against a disciplinary conviction cannot, as a rule, interfere with the subjective evaluation of the relevant facts as made by the appropriate organ (see *Enotiadou* v. *Republic* (1971) 3 C.L.R. 409 at p. 415).

(6) That there was ample material upon which the *sub judice* decision could be arrived at; that the respondent Board having ascertained these acts of the applicant according to its unfettered judgment and having described them as constituting the disciplinary offence of breach of duty and of conduct incompatible with the office of a public officer the act against which the recourse is directed is rendered legally reasoned and that, accordingly, the ground of absence of reasoning is rejected.

(7) That, without this Court sharing the view that the punishment imposed was excessively hard and cruel, failing any legislative provisions entitling this Court, in the exercise of its competence under Article 146, to decide on the substance of certain aspects of disciplinary matters, the severity as such, of a disciplinary sanction cannot be tested, and decided, upon by means of a recourse under Article 146 (*Republic* v. *Mozoras* (1970) 3 C.L.R. 210 at p. 221 followed).

(8) That desirable as it is to have uniformity in the sentences imposed, either in disciplinary offences or in the course of the administration of criminal justice, yet, it is practically impossible to say that any two cases and the factors pertaining to each one of them, either, personal to the offender or to the offence, are so identical as to warrant the application of the principle of equal treatment in case where different sanctions or sentences are imposed; and that, therefore, the ground of law that the *sub judice* decision was contrary to Article 28 of the Constitution and generally to the principles of equality cannot be accepted as none of the instances referred to in the evidence can be really said to be identical.

Application dismissed. No order as to costs.

Cases referred to:

Cleanthous v. *C.Y.T.A.* (1974) 3 C.L.R. 461 at pp. 464–467;

Christofis v. *Republic* (1970) 3 C.L.R. 97;

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

Papasavvas v. *Republic* (1967) 3 C.L.R. 111;

Piperis v. *Republic* (1967) 3 C.L.R. 295;

Pelides v. *Republic*, 3 R.S.C.C. 13 at p. 17;

Wisconsin Telephone Co. v. *Public Service Commission*, 232 Wis. 274, 287 N.W. 122 (1940);

Enotiadou v. *Republic* (1971) 3 C.L.R. 409 at p. 415;

Lambrou v. *Republic* (1972) 3 C.L.R. 379 at p. 389;

Republic v. *Mozoras* (1970) 3 C.L.R. 210 at p. 221;

Case Nos. 1823/56 *and* 1508/50 *of the Greek Council of State.*

Recourse.

Recourse against the decision of the respondent to reduce in grade the applicant to the immediately lower *post* of Assistant Manager, Economic Services and to impose a fine on him after finding him guilty of various disciplinary offences.

A. Markides, for the applicant.

A. Hadjioannou with *C. Hadjioannou*, for the respondent.

Cur. adv. vult.

A. LOIZOU J. read the following judgment. By the present recourse the applicant seeks a declaration from the Court, that the administrative act and or decision of the respondent Authority contained in their document dated 28th December, 1976, (*exhibit A*) which will hereinafter be set out is null and void and with no legal effect.

The said decision, *exhibit* "*A*" reads as follows:

"*Decision*

On the Appeal dated 14th October, 1976, of Marios Christofides, Chief Accountant,

—against—

The decision of the General Manager of the Authority dated 25th September, 1976, whereby he was found guilty of the following charges:–

(a) Acts incompatible with his position as an employee of the Authority.

(b) Accusations, affecting the prestige and dignity, and or the exercise of mala fide criticism of their

acts by expressions showing lack of respect and or intentional use of unfounded arguments.

(c) Conduct capable and or tending to disturb the relations of the personnel and the Authority by the creation of dissatisfaction and distrust as to the unselfish carrying out of the work of the Board.

(d) Unbecoming conduct towards the manager and degrading of his authority.

The Board, at a meeting which took place on the 19th November, 1978 heard in plenary session the present appeal of the Chief Accountant against the decision of the General Manager who tried in the first instance the accusations proved against him, after an investigation procedure which was carried out in accordance with the regulations in force by a three member committee composed of officers of the same rank as the Chief Accountant, and at another one, which took place on the 28th December 1976, studied the case and issued its decision.

2. At the hearing of the present appeal every opportunity was given to the appellant and his advocate to argue the grounds of his appeal.

3. The Board examined with due attention the said grounds of appeal as well as the arguments of the counsel of the appellant who explained them extensively as well as his reference to the minutes of the committee of inquiry and the procedure before the General Manager and his decision.

4. From the outset it gave the necessary importance to the first ground of appeal, namely that the General Manager, being the person who was affected by the behaviour of the Chief Accountant M. Christofides under examination, had no competence to try the charges preferred against him (the Director of Economic Services).

5. The Board having in mind what was said by the Supreme Court in the case of *Cleopatra Cleanthous against the Cyprus Telecommunications Authority* (1974) 3 C.L.R. p. 461, decided to examine itself the whole case, given that

the procedure followed was that provided in section (E) of the Internal Rules instead of proceeding to any other arrangement, although it realises that that procedure was followed as a result of necessity on account of the fact that there was no officer of the Authority senior in rank to that of the Manager of Economic Services to try him except the General Manager.

6. So, inevitably the procedure followed was that provided by the Internal Rules which as amended by the decision of the Board 12/75, taken at its meeting 10.12.75, give wide powers to the General Manager "to try, decide and impose the appropriate in his judgment sanction as a Court of first instance" for disciplinary offences of the officers of the Authority.

7. For this purpose the Board and in order to avoid any misunderstanding or complaint undertakes to try as a whole the case relying on all the elements which are before it without being influenced by those parts of the decision of the General Manager which are challenged by the present appeal on the ground that he was personally involved, which it completely ignores.

8. The Board followed the aforesaid course as it realises that the procedure before it constitutes re-examination of the case on the basis of the minutes and *exhibits* which present the procedure so far.

9. The Board carefully examined the minutes of the Board of investigation, *exhibits*, the addresses of counsel of the appellant before the General Manager and before it (the Board), as well as what was stated by the appellant before it in his defence and finds that they are really sufficient in order to form an opinion and that it does not need to re-examine any witness or call additional witnesses.

10. The Board examined in particular the depositions of the witnesses before the Board of Investigation as well as those called by the General Manager. It examined this evidence for the purpose of forming itself an opinion.

11. Given this, the Board finds that:

(a) On the 19th June, 1976, there was a meeting in the

office of the General Manager in which took part the appellant, Mr. S. Modestou, Mr. Scottis, i.e. the Assistant Director of Economic Services, and the external auditor of the Authority, for the purpose of informing the General Manager about the general Accounts of the Authority for the year 1975.

(b) At this conference the appellant raised the question of the management by the Authority of the Pension Fund of its employees. There followed a discussion during which the appellant misbehaved and used improper language undermining for a senior officer of the Authority. He made various remarks about the previous Boards of the Authority for which he showd contempt. He made mala fide criticism leaving in many instances innuendos for their competence, their integrity in the execution of their duties.

(c) In particular from his own statement before the Board of Investigation, p. 5 para. 3 he said there was in the past indifference on the investments of the Funds by the Boards. And in p.11 and at the beginning of p. 12 it is mentioned by Mr. Modestou that the appellant said that the money of the monthly staff were invested with 4% interest and of the weekly staff at 7%.

(d) Moreover at pages 11 and 12 of the minutes of the investigation Board it appears clearly the definite intention of the appellant and his effort to degrade the previous Boards. At p. 12 in the middle of it he is presented to have said that the Boards probably had an interest and deposited the money of the monthly paid at 4% interest.

(e) The aforesaid are confirmed and from the evidence of Mr. Scotti at p. 14 of the minutes of the Board of Investigation, para. 1 who states that the appellant said that when the employees administer their fund they secure better interest and gave the example of the weekly paid at 7% and the permanent monthly paid at 4%.

(f) The Board further observes that the conduct of the

appellant in general at the said conference was improper, offensive to the Board and the General Manager, the insinuations which were made against the said Boards and in the presence of the external auditor of the Authority, were completely unacceptable given that the appellant was the senior officer in the accounts department at the time he was referring, and or Chief Accountant and he was accepting without protest the said lodgments of money.

(g) Generally the Board finds that the place and time that the appellant chose to make the aforesaid remarks which proved to be inaccurate (see the minutes of the proceedings before the General Manager, pages 6–9) as well as the tone he used to argue them, exclude the bona fide criticism or an expression of opinion as maintained by his counsel. The appellant had more than enough time to submit a confidential report to the General Manager instead of submitting for approval to the Board every year the accounts of the Authority, which also contained the condemned now by him, acts without any observations. He never did this in the past and for the first time in the presence of the external auditor tried to degrade the General Manager and the previous Boards in order to secure what he wanted (see the minutes of the investigation committee pages 12, 13, 14 evidence Mr. Modestou and Scotti).

(h) Moreover the Board observes that until the end of the procedure the appellant never expressed remorse or withdrew anything of what he said although they were proved to be inaccurate (pages 6, 7, 8, 9, of the minutes of the proceedings before the General Manager and pages 38, 39, of the minutes of the appeal). For all the above reasons the Board unanimously finds the appellant guilty as per the charges and dismisses grounds (A) (B) and (C) of the appeal. Particularly as to ground (C) of the appeal the Board dismisses it as the appellant ignored the great powers which were

given to the General Manager by the amendment of the relevant provisions of the Internal Rules by the decision of the Board of the Authority No 12/75 dated 10th December, 1975, copy of which was given to the counsel of the appellant at the hearing of the appeal (pages 11, 12 of the minutes of the procedure of the appeal).

(i) With regard to the punishment imposed the Board conferred for long before it reached this decision. For that purpose it took into consideration

(i) the nature of the offence which the appellant committed;

(ii) the *post* which he held with the Authority and his 18 year long service with it without a previous offence;

(iii) the personal circumstances, namely that he is married with children and came to the conclusion that the sentenc eof dismissal from the Authority imposed is excessive and instead unanimously decides and imposes

(1) Reduction in grade of the appellant to the immediately lower *post* from the one held, i.e. to the *post* of Assistant Manager, Economic Services and without the right of assuming the duties of acting Chief Accountant.

(2) As fine the loss of half of his remuneration from 19 June, 1976, the date on which he was placed on suspension, until the 31st December, 1976.

(3) The refund by him of any amount which he received from the Provident Fund or otherwise from the Telecommunication Authority of Cyprus."

The facts leading to this decision to the extent that they do not appear in the judgment just set out are the following:-

The applicant was in the service of the respondent Authority for about 18 years and was eventually promoted to the *post* of

Director of Economic Services or Chief Accountant, as he is referred to, in some of the documents before me.

On the 19th June, 1976, the applicant was invited together with Messrs S. Modestou, Assistant Director Economic Services and G. Scotti, External Auditor of the respondent Authority, to a meeting in the office of the General Manager for the purpose of discussing subjects relating to the audited accounts of the respondent Authority, for the year 1975, for the purpose of giving the necessary information to the General Manager, in anticipation of their submission to the Board of the respondent Authority. The conduct of the appellant at the meeting was such as to be considered by the General Manager as amounting to serious irregularities or offences and for that reason he was suspended from duty and a Board of Investigation was set up by the General Manager for the purpose of inquiring into these offences. This board was composed of Messrs. G. Papaioannou as Chairman, S. Kokkinides and M. Markides, as members.

The decision to suspend the applicant from duty was communicated to him on the same day and was the subject of recourse No. 209/76, (*exhibit* "Σ"). This Board of Inquiry inquired into the offences and heard a number of witnesses including the applicant himself; it also had before it a report from the General Manager. The proceedings were recorded in writing and the Board of Investigation forwarded on 14.7.76 these records together with their finding (*exhibit* "*H*" to the General Manager. These findings are to be found at pages 23, 24, 25 and 27 of *exhibit* "H".

In accordance with rule 5 of section "E" of the Internal Rules, the General Manager asked the appellant to appear before him for the hearing of four charges against him. They are the ones that are to be found in the decision of the Board of the respondent Authority, already set out in this judgment.

By letter dated 29th July, 1976, the applicant was further informed that in addition to the evidence already given before the Board of Investigation, evidence was to be adduced regarding the rate of interest at which the money of the two Funds were invested. He was also informed that he could appear personally or that a lawyer or other person of his choice might submit in writing his defence. He was also supplied with a copy of the report of the Board of Investigation.

The applicant appeared before the General Manager on the 28th August, 1976, represented by his present counsel. A preliminary objection taken at the outset, namely that the General Manager could not be impartial as he was also a witness and a person involved in the charges, being both an accuser and a Judge as well was overruled and the case proceeded for hearing. The minutes of these proceedings have been produced and are *exhibit* "Θ".

On the 25th September, 1976, the General Manager issued his decision, found the applicant guilty and imposed on him the punishment of dismissal from the Authority. This decision was the subject of a Recourse No. 303/76 (*exhibit* "T"). In the meantime, however, an appeal was filed against that decision to the Board of the respondent Authority and it is the decision of this Board that is the subject of this recourse.

Recourse No. 209/76, already referred to, was withdrawn on the 5th February, 1977, as by then the Board of the respondent Authority had delivered its judgment, whereby the dismissal of the applicant by the General Manager had been revoked and replaced by demotion. Recourse No. 303/76 was also withdrawn as the decision which was the subject matter of that recourse had been revoked by the Board of respondent 1, and a new recourse, the present one under consideration was filed against the new decision of the Board.

After the communication to the applicant of the decision of the Board of the respondent Authority (*exhibit* A), he was asked by letter dated the 31st December, 1976 (*exhibit* Λ) to assume his duties as from the 3rd January, 1977. To this letter he replied through his advocates by letter dated the 11th January, 1977 (*exhibit* Y), by which the respondent Authority was informed that the applicant had given instructions for the filing of a recourse against that decision under Article 146 of the Constitution, and as he was considering that decision as null and void it was impossible for him to return and assume the duties of the Assistant Director, Economic Services, though he would be ready to assume his previous duties as Director; he further informed them that the cheque sent to him for the amount he had to receive from the Provident Fund was not cashed and reserved all his rights.

By letter dated the 20th January, 1977 (*exhibit M*) the applicant was called once more to assume his new duties up to the 31st January, 1977, otherwise his services would be considered as terminated on the ground of persistent refusal to assume duties with the respondent Authority. To this letter the applicant replied again through his counsel by letter dated 29th January, 1977 (*exhibit Z*) informing them that as the applicant was considering himself unjustifiably pressed he decided to submit and by that letter submitted "under pressure and duress" his resignation from the respondent Authority reserving at the same time fully his rights to seek from the competent Court the annulment of the decision communicated to him by the letter of the 29th December, 1976, as well as his right to seek through appropriate legal measures his reinstatement to the *post* legally held by him, namely that of the Director Economic Services to which he had been appointed by the Public Service Commission, the organ having competence in the matter under the Constitution.

Furthermore by letter dated 17th February, 1977 (*exhibit Z1*) the applicant through his advocates, whilst fully reserving all his rights including the right to seek the annulment of the sub judice decision by the competent Court, asked to be paid: (a) the whole sum, i.e. capital and interest which he had to receive from the Provident Fund of the monthly paid employees of the respondent Authority; (b) salaries and other benefits which were due to him for the year 1976; and (c) the amount equal to full remuneration for the period of the annual leave which he was entitled for the year 1976.

The present recourse was filed on the 12th March, 1977, that is after the resignation of the applicant from the respondent Authority, in the circumstances hereinabove set out.

On these facts, counsel for the respondent Authority has raised the point that the applicant does not possess a legitimate interest in the sense of Article 146.2 of the Constitution and that in any event there could be no reservation of right in the circumstances as a valid principle of administrative Law that could safely be relied upon by the applicant.

In support of his first proposition, counsel for the respondent Authority referred to the case of *Christofis* v. *The Republic* (1970) 3 C.L.R., p. 97, where it was held following the Greek caselaw

on the matter, that the legitimate interest required must exist both at the time of the making of an act and at the time when its validity is challenged and that as stated in Case No. 1823/56 of the Greek Council of State, the legitimate interest must arise out of a legal relationship of an applicant which is already in existence when the act concerned in challenged. In this case the applicant was challenging the validity of the decision of the Public Service Commission not to appoint him to the post of warder in the Prisons Department. He was at all material times a warder in the Department of Prisons on a temporary basis but was in the meantime dismissed from his post for misconduct, thus becoming no longer eligible for the appointment, subject matter of that recourse.

The learned trial Judge in Christofis case (*supra*) referred to the case of *Neophytou* v. *The Republic*, 1964 C.L.R. 280, also relied upon by counsel for the respondent Authority. This was a recourse against the decision of the Public Service Commission to promote another candidate in preference and instead of the applicant to the post of Inspector in the Cyprus Telecommunications Authority who did not possess the required qualification at the time the decision for promotion was taken and therefore he was found not to have a legitimate interest under Article 146.2 of the Constitution.

The presence of existing legitimate interest is essential to the exercise of a right of recourse under Article 146. The word "existing" to be found in para. 2 of Article 146, denotes according to the caselaw of this Court that it must exist at the time of the filing and the hearing of a recourse, and these requirements are satisfied also in cases where at the material time it is clear that the existing interest of an applicant, though not yet actually adversely and directly affected, is unavoidably bound to be so affected eventually. (See *Kyriacos Papasavvas* v. *The Republic*, (1967) 3 C.L.R., p. 111. See also the *Conclusions from the Caselaw of the Greek Council of State* 1929–1959, p. 260 and *Tsatsos Application for Annulment 3rd Edition* para. 16, pp. 48–49 where it is stated that there continues to exist the detriment suffered by the act or omission when the person affected lost subsequently the quality for which the act or omission related to him without, on account of this, the removal of the injury suffered). In support of this proposition reference is made to a number of decisions of the Greek Council of State.

In the case in hand, however, one need not go into the matter beyond the fact that the pecuniary interest of the applicant was and continued to be affected at the time of the hearing of this recourse, since by the sub judice decision he was adjudged to pay by way of fine half of his emoluments for the period between the 19th June, 1976 to the 31st December 1976, and that this fine was collected by the respondent Authority.

Moreover in the circumstances of this case the legitimate interest of the applicant has not been lost because of any acceptance of the sub judice decision. He resigned with reservation of his rights and made it clear that he intended to pursue his reinstatement to the post, he was, as he claimed, legally entitled to.

I cannot for a moment think that the applicant by his act of resignation consented to or accepted the sub judice decision. I find therefore that the applicant ha. an existing legitimate interest and therefore he satisfies the basic requirement of Article 146.2 of the Constitution and the present recourse can proceed. The case of *Piperis* v. *The Republic* (1967) 3 C.L.R. p. 295, suggests that there exists in our Law the principle that the reservation of rights by a person affected by an administrative decision preserve his legitimate interest in the matter and render ineffective anything that might otherwise have been considered as an acceptance of the administrative act complained of.

Having reached this conclusion I must now turn to the several grounds of Law relied upon by the applicant which are the following:

1. The *sub judice* act and/or decision and/or the procedure followed constitute a violation of the rules of natural justice inasmuch as the General Manager, whose decision was the subject of appeal to the Board of the respondent Authority, acted as a Judge, prosecutor and witness, although one of the charges against the applicant was for unbecoming conduct towards him.

2. The *sub judice* act and/or decision and/or the procedure followed was taken in abuse and/or excess of power and/or contrary to the general principles of Administrative Law in the sense that:

   (a) it was not duly and/or sufficiently reasoned;

(b) there was misconception of fact; and

(c) facts were taken into consideration which should not have been so taken.

3. The procedure and/or material parts which led to the taking of the *sub judice* decision constituted violation of several regulations of the respondent Authority, namely:

(a) Regulation 3 of Section (E) of the Internal Rules, whereby the General Manager "may recommend the suspension from duty of the accused" and not himself suspend him.

(b) There was a difference between the charges for which he was suspended from duty with those for which he was summoned to face before the Board of Investigation.

(c) The applicant was a Head of a Department and Rule 1 of Section (E) was not applicable to a person holding such a post as the one held by the applicant.

(d) The General Manager had no authority under Rule 1(a) and (b) of Section (E) to try the case.

(e) The refusal of the General Manager to interview the accused after studying the proceedings of the Board of Investigation under Rule 5(a) of Section (E) of the Internal Rules.

(f) That the General Manager had no authority under Rule 5 to impose a punishment on an accused person, but only to recommend which of a number of prescribed punishments should be inflicted. In this respect the decision of the respondent Board No. 12/75, dated 10.12.75 does not constitute a rule as it was neither published nor communicated to the applicant and/or the employees of the respondent Authority.

4. The *sub judice* act and/or decision was taken in abuse and/or excess of power and/or is illegal and this on account of the fact that the Board of the respondent Authority which tried the said appeal acted on a mis-

conception of Law when deciding that it could act as a Court of first instance and not as an appellate Court; by this action and in conjunction to the fact that the General Manager could not try the applicant by virtue of the rules of natural justice, the applicant was substantially deprived of his right of appeal.

5. The *sub judice* act and/or decision was taken in abuse and/or excess of power inasmuch as the verdict of guilt reached against the applicant was unreasonable and/or unfounded and/or the punishment imposed excessively harsh and cruel.

6. This ground which was to the effect that the *sub judice* decision was contrary to Article 125 of the Constitution, was not pursued at the hearing.

7. The *sub judice* act and/or decision was contrary to Article 28 of the Constitution and generally to the principle of equality, because in other cases where officers of the respondent Authority were found guilty of more serious offences than those attributed to the applicant, lighter punishments were imposed.

The relevant Internal Rules and in particular s. E thereof which deals with offences and punishments were produced as *exhibit 'K'*, but were set out in the case of *Cleopatra Cleanthous* v. *The Cyprus Telecommunications Authority* (1974) 3 C.L.R. p. 461 at pp. 464–467, inclusive. In the said case the issue was raised that the competent organ to deal with that disciplinary matter was not the Board of the respondent but its General Manager. Triantafyllides, P. had this to say at pp. 469–470:

"Therefore, in my opinion, even after the enactment of Law 61/70 the Rules, of which section E—quoted above—forms a part, continued to be in force; and in view of the express provisions of rule 5, I have reached the conclusion that the Board of the respondent was not competent to deal with the issue of the guilt or innocence of the applicant regarding the disciplinary charges against her and, therefore, the decision challenged by this recourse has to be declared to be *null* and *void* and of no effect whatsoever, because of lack of competence of the organ which took it, namely the Board of the respondent.

The above view of mine is strengthened by the provision in rule 6 about the right of appeal, which undoubtedly means that there is a right of appeal to the Board after a decision has been reached by the General Manager of the respondent; and in the present instance it is quite clear that the Board did not deal with the case of the applicant by way of appeal; thus, the applicant was tried by a disciplinary organ which did not possess competence to deal with her case, and at the same time she was deprived of her right of appeal under the Rules.

I have not lost sight of the fact that in the complaints made against the applicant there is a reference to the General Manager in such a manner as not to exclude the possibility that it might be objected that, in the circumstances, he should be considered as being disqualified to deal with the disciplinary matter in question. In my view this possibility did not and could not result in automatically vesting the relevant disciplinary competence in the Board of the respondent; what should have been done—(and there is nothing to show, by means of any record or otherwise, that this was what has happened in this case)—was that the General Manager, if there had arisen any question of his being disqualified, should have sought the instructions of the Board and the Board could have decided who would carry out the duties of the General Manager under section E of the Rules in relation to the specific disciplinary matter.

It is correct that in paragraph (c) of Rule 5 of section E there is to be found the expression 'the General Manager will recommend which of the following punishments will be inflicted', but in my opinion this does not involve any competence of the Board of the respondent other than as regards a final decision as to the punishment to be imposed, and, in any case, it does not confer upon the Board any competence to decide as to the guilt of the officer concerned; such decision has to be reached by the General Manager under paragraph (a) of Rule 5 and then an appeal may be made to the Board.

Having found that the matter in question was dealt without competence I think that I should not deal with any other aspect of this case as it is possible—though not

imperative—that the respondent may decide to reinstitute disciplinary proceedings against the applicant in respect of the matter in question. In the result, the *sub judice* decision of the Board of the respondent is declared to be *null* and *void* and of no effect whatsoever."

I agree with the approach of the learned President that the General Manager of the respondent Authority was given competence under the Internal Rules to try disciplinary offences in the first instance with a right of appeal to the Board of the respondent Authority; and that the expression to be found in para. (c) of Rule 5, of s. (E) that "the General Manager will recommend which of the following punishments will be inflicted", does not involve any competence of the Board of the respondent Authority other than as regards a final decision as to the punishment to be imposed and that "in any case it does not confer upon the Board any competence to decide as to the guilt of the officer concerned and that such a decision has to be reached by the General Manager under para. (a) of Rule 5, with a right of appeal therefrom to the Board". This approach in fact answers most of the sub-headings of Ground 3 of the laws relied upon by the applicant in this recourse.

Moreover, after this judgment was delivered and obviously in order to bring the Internal Rules in line with its approach, the respondent Authority amended the Internal Rules by its Decision No. 12/75, dated 10.12.1975, whereby the General Manager was expressly given the power to try, determine and impose the appropriate punishment in disciplinary offences as a Tribunal of first instance and that the Board of the respondent Authority would entertain such cases as an appeal Tribunal if the affected employee challenged the decision of the General Manager. Furthermore, under *exhibit* '*K*.1', Rule IX, para. 2, the General Manager is given the right to suspend an employee pending an investigation in the case.

It has been argued that this amendment was never brought to the knowledge of the applicant and therefore it was not valid. I do not subscribe to this view and I find that these regulations were in force at the appropriate time. In any event and irrespective of these findings, the interpretation of the Internal Rules and in particular Section E thereof, empowers the General Manager to act, as he did, in the present case.

In my view, however, most of the grounds of law relied upon on behalf of the applicant are answered if one examines the nature of the appeal and the decision reached thereon, which, in fact, is the decision subject-matter of this recourse. The relevant regulations give to the applicant a right of appeal and this right is in nowhere affected by the disputed amendment of the regulations. In fact, Triantafyllides, P., in *Cleanthous* case (*supra*) at p. 470 clearly says that an appeal may be made to the Board.

This sort of appeals are in effect procedures for administrative review of executive or administrative acts or decisions. In *Pelides* v. *The Republic*, 3 R.S.C.C. p. 13, at p. 17, the then Constitutional Court had this to say on the question of such reviews:-

> " Such review may be either -
>
> (a) by way of confirmation or completion of the act or decision in question, in which case no recourse is possible to this Court until such confirmation or completion has taken place (e.g. under section 17 of CAP. 96); or
>
> (b) by way of a review by higher authority or by specially set-up organs or bodies of an administrative nature, in which case a provision for such a review will not be a bar to a recourse before this Court but once the procedure for such a review has been set in motion by a person concerned no recourse is possible to this Court until the review has been completed.
>
> Such review procedures, as aforesaid, are in no way contrary to, or inconsistent with, Article 30 of the Constitution because specially set-up organs or bodies of an administrative nature are not judicial committees or exceptional Courts in the sense of paragraph 1 of such Article."

Appeals as they are usually called or recourses for administrative review to hierarchically superior authorities or organs are frequently prescribed by Laws and Rules as a means of affording the citizen the opportunity of examining the legality of an administrative act and the re-examination of his case by

the administration by the powers of such superior organs which are usually regulated by Law or regulation. In the present case there are no restrictions or limitations to the powers of the Board the hierarchically superior organ of the respondent Authority in entertaining an appeal to it from the decision of a subordinate organ. Its discretion in the matter is unfettered and no doubt can exercise its own discretion in the place of that of the subordinate organ. It had in my view power to re-examine from the beginning the whole complaint and this is what was done in the present case in particular of the allegations of prejudice or bias on the part of the General Manager, without this meaning that the Board of the respondent Authority accepted the validity of such allegation. Whilst on this point it may be mentioned that by the doctrine of necessity, where the only Tribunal empowered to act in a controversy is allegedly biased, the Tribunal still has jurisdiction since the alternative is non-enforcement of the Law, although it has been said that where there is any suggestion of bias in an administrative Tribunal the Court on judicial review would look more critically at the Tribunal's findings. (*Wisconsin Telephone Co.* v. *Public Service Commission*, 232 Wis. 274, 287 N.W. 122 (1940). See also *Administrative Law Cases and Materials* by Jaffe and Nathanson, pp. 995, 996 and 997).

This principle is also accepted in English law as shown in *Halsbury's Laws of England*, 4th Ed., Vol. 1, p. 81, para. 67, where it is stated:

> "*Interest and likelihood of bias.* It is a fundamental principle that, in the absence of statutory authority or consensual agreement or the operation of necessity, no man can be a Judge in his own cause. Hence, where persons having a direct interest in the subject matter of an inquiry before an inferior tribunal take part in adjudicating upon it, the tribunal is improperly constituted and the Court will grant an order of prohibition to prevent it from adjudicating, or an order of certiorari to quash a determination arrived at by it, or such other remedy (for instance, an injunction or a declaration) as may be appropriate. The principle extends not only to Courts and tribunals, but also to other bodies, including public authorities, determining questions affecting the civil rights of individuals."

The Board of the respondent Authority in view of the allega-

tions of the applicant that there was bias or likelihood of bias, very rightly decided:

> " For this purpose the Board and in order to avoid any misunderstanding or complaint undertakes to try as a whole the case relying on all the elements which are before it without being influenced by those parts of the decision of the General Manager which are challenged by the present appeal on the ground that he was personally involved, which it completely ignores.
>
> The Board followed the aforesaid course as it realises that the procedure before it constitutes re-examination of the case on the basis of the minutes and *exhibits* which present the procedure so far."

It did in fact examine all the material before it and having come to the conclusion that it was not necessary to re-examine any witnesses or call additional witnesses, proceeded to give its findings. Moreover the rank of the applicant was such that there was nobody superior to him to try his case in the first instance other than the General Manager himself. All the officers senior to the applicant were members of the Board of Investigation, and the Board of the respondent Authority remained uninvolved in the matter until it was brought to it at the instance of the applicant on appeal.

The applicant was duly tried in the first instance by the General Manager and he exercised himself the right of appeal given to him by the statutory regulations of the Authority. For all the above reasons, grounds 1, 3, and 4, should fail.

Grounds 2 and 5 present no difficulty in their determination as the sub judice decision was duly reasoned and there does not appear to have been any misconception of fact or that any facts were taken into consideration which should not have been so taken, nor is there any abuse or excess of power or that the verdict was unreasonable and or unfounded.

As stated in the conclusions of the Case Law of the Greek Council of State 1929-1959 p. 268 "For the existence of a misconception of fact there is required an objective nonexistence of the actual circumstances and prerequisites upon which the act is based (2134/52) which is ascertained in the absence of the

element of the subjective test: 1089/46. There does not exist a misconception of fact when the administration determines items which in substance are different and conflicting; whose determination may in principle lead to the conclusion arrived by the administration. The substance of such determination is not controlled in the annulment trial (see also 1474/56)."

I do not find it necessary to go into the details of the evidence. Suffice it to say that there was ample material upon which the sub judice decision could be arrived at as stated in decision No. 1508/50 of the Greek Council of State. Having ascertained these acts of the applicant according to its unfettered judgment and having described them as constituting the disciplinary offence of breach of duty and of conduct incompatible with the office of a public officer the act against which the recourse is directed is rendered legally reasoned and the ground of absence of reasoning which was put forward is thus rejected.

Whereas misconception of fact put forward as a ground of annulment is also groundless since the objective non-existence, cited by the applicant, of the acts referred to in the decision against which the recourse is directed has not been ascertained.

As stated in the case of *Enotiadou* v. *The Republic* (1971) 3 C.L.R. p. 409 at p. 415:

> " It is well settled that an administrative Court in dealing with a recourse made against a disciplinary conviction cannot, as a rule, interfere with the subjective evaluation of the relevant facts as made by the appropriate organ (see, *inter alia*, the decisions of the Council of State in Greece in cases 2654/1965 and 1129/1966)."

This principle was adopted in the case of *Lambrou* v. *The Republic* (1972) 3 C.L.R. 379, at p. 389.

In any event on the available material the conviction of the applicant was duly warranted in the circumstances.

On the question that the punishment imposed was excessively hard and cruel, without sharing this view, the answer is to be found in what was stated by Triantafyllides, J., in the *Republic* v. *Mozoras* (1970) 3 C.L.R. 210 at p. 221, where he said:

" Lastly, I have to deal with the contention—again not

decided by the trial Judge, once he had annulled the dismissal of the respondent—that the disciplinary punishment imposed on the respondent was excessive. The short answer to this is that failing any legislative provisions entitling this Court, in the exercise of its competence under Article 146, to decide on the substance of certain aspects of disciplinary matters (and it would be in the interest of justice if such provisions came to be enacted here, as in Greece) the severity, as such, of a disciplinary sanction cannot be tested, and decided upon, by means of a recourse under Article 146 (see Kyriacopoulos on Greek Administrative Law, 4th ed. Vol. III, p. 305, p. 308).

Grounds of Law 2 and 5 also fail.

Ground 6, was withdrawn.

It remains now to examine ground 7 that the *sub judice* act and/or decision was contrary to Article 28 of the Constitution and generally to the principles of equality inasmuch as the officers of the respondent Authority when found guilty of more serious offences than those attributed to the applicant were punished with lighter punishment.

Evidence on this subject was heard. Desirable as it is to have uniformity in the sentences imposed, either in disciplinary offences or in the course of the administration of criminal justice, yet, it is practically impossible to say that any two cases and the factors pertaining to each one of them, either, personal to the offender or to the offence, are so identical as to warrant the application of the principle of equal treatment in cases where different sanctions or sentences are imposed. I cannot therefore accept this ground of Law either as none of the instances referred to in the evidence can be really said to be identical.

For all the above reasons the present recourse is dismissed but in the circumstances I make no order as to costs.

Application dismissed. No order as to costs.