

1983 April 13

[MALACHTOS, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

VASSOS TSERIoTIS,

Applicant,

v.

THE MUNICIPALITY OF NICOSIA,

Respondent.

(Case No 63/79).

Administrative Law—Executory act—Confirmatory act—Obtaining of legal advice by an administrative authority in reconsidering a previous decision does not by itself constitute a new fact—Rejection of applicant's claim for recognition of his previous service for pension purposes—Application for reconsideration—No new facts put before the respondent—New decision of the respondent a confirmatory one of its previous decision—Is not of an executory nature and cannot be made the subject of a recourse under Article 146 of the Constitution.

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By means of a letter dated 1st February, 1978 the applicant applied to the respondents that they should recognise for pension purposes his twelve years previous service with the Improvement Board of Prodromos on the ground that this was promised to him by the then Mayor of Nicosia. The respondents rejected applicant's claim by letter dated 4th April 1978 and applicant by his letter of the 15th April 1978 applied for reconsideration of the rejection of his claim by referring to the case of another officer, without naming him, whose sixteen years previous service with a bank had been recognised for pension purposes. The respondents rejected again applicant's claim and informed him of the rejection by letter dated 21st July, 1978. The applicant applied again on the 23rd July, 1978 asking for a reconsideration of his case and referred by name to Mr. Koutas as the case of the officer whose previous service had been recognised. The respondents replied by their letter of the 30th

November, 1978 and informed applicant that they "decided afresh, having in mind the opinion of the legal advisers of the Municipality on this subject, that it is not possible to approve your claim for the same reasons which are referred to in our letter under the same elements and dated 21st July, 1978". 5

As against this reply applicant filed the present recourse on the 1st February, 1979.

The respondent Municipality in its opposition besides the allegation that the decision complained of was lawfully taken, raised the objection that the letter of the 30th November, 1978, confirmed its decision of the 17th May, 1978 which was communicated to the applicant on the 21st July, 1978 and, consequently, the recourse was out of time as it was not filed within the time limit of seventy-five days prescribed by Article 146.3 of the Constitution. 10 15

Counsel for applicant submitted that in the letter of the applicant of the 23rd July, 1978, to the respondent Municipality reference was made for the first time to the case of Mr. Koutas and this constitutes a new fact. Also a new fact was the obtaining by the respondent of a legal advice on the subject as they said in their letter to the applicant dated 30th November, 1978, where the decision complained of is contained. 20

Held, that irrespective of the fact that the obtaining of a legal advice by an administrative authority in reconsidering a previous decision does not by itself constitute a new fact, in the present case even if the argument of counsel for applicant on this point is accepted as correct, it cannot be considered as a new fact, as such advice is dated 2nd March, 1978, and was before the Municipal Committee at its meeting of the 15th May, 1978 when the decision contained in their letter of the 21st July, 1978, was reached; that it is clear from the documentary evidence adduced in these proceedings that no new facts were submitted to the respondent Municipality by the applicant in addition to the facts on which its decision contained in its letter to the applicant of the 21st July, 1978, was taken; that, consequently, the decision of the respondent contained in its letter to the applicant dated 30th November, 1978, the subject matter of the present recourse, is a confirmatory one of its previous decision and is not of an 25 30 35

executory nature and, therefore, it cannot be attacked by a recourse under Article 146 of the Constitution.

Application dismissed.

Cases referred to:

- 5 *Lordos Apartotels Ltd. v. Republic* (1974) 3 C.L.R. 471;
 Georghiou v. Republic (1982) 3 C.L.R. 828.

Recourse.

Recourse against the refusal of the respondent to recognise applicant's previous years of service with the Improvement Board of Prodromos for pension purposes.

Ph. Valiantis, for the applicant.

K. Michaelides, for the respondent.

Cur. adv. vult.

15 MALACHTOS J. read the following judgment. The applicant filed the present recourse claiming a declaration of the Court that the act and/or decision of the respondent Municipality not to recognise his previous years of service with the Improvement Board of Prodromos for pension purposes, which is contained in its letter dated 30th November, 1978, is null and
 20 void and of no legal effect whatsoever and that whatever has been omitted should have been performed.

The applicant was appointed as a municipal market inspector on the 13th September, 1954 on a temporary basis and as from the 1st January, 1955 his appointment became permanent according to the decision of the respondent taken at its meeting of
 25 the 13th January, 1955.

The employment of the applicant came to an end on the 30th November, 1978 upon reaching the pensionable age of sixty years.

30 By his letter dated 1st February, 1978 the applicant applied to the respondent that they should recognise for pension purposes his twelve years previous service with the Improvement Board of Prodromos on the ground that this was promised to him by the then Mayor of Nicosia Dr. Them. Dervis.

35 In view of the fact that in the minutes of the meeting of the respondent Municipality of the 13th January, 1955, which is

the only document concerning the appointment of applicant, there is nothing to the effect that he was offered or accepted employment with the respondent on condition that the latter should recognise his previous service for pension purposes, the respondent by its letter dated 4th April, 1978 informed the applicant that his claim could not be accepted. 5

This letter reads as follows:

"I have been instructed to refer to your letter dated 1st February, 1978, in conjunction with your claim for recognition, for pension purposes, your twelve years previous service with the Improvement Board of Prodromos and to inform you that the Municipality cannot accept your said application in view of the fact that in accordance with the provisions of the Municipal Corporations Law, no appointments are offered conditionally and any such appointment is subject to the approval of the District Officer. 10 15

In the minutes of the Municipal Council is recorded only your official appointment as from 1st January, 1955 and nothing is referred about any approval of your twelve years previous service with the Improvement Board of Prodromos. The introduction of any additional evidence cannot supplement or alter the validity of the decision of the Municipal Council and, therefore, cannot be accepted. 20

It is further referred that according to the Pensions and Gratuities Regulations, which were in force at the time of your appointment, only service with the Municipality should be taken into account for pension purposes". 25

By letter dated 15th April, 1978, addressed to the respondent, the applicant challenged the correctness of the rejection of his claim and asked the respondent for its reconsideration. He referred to a similar case, obviously the case of the ex Town Clerk Mr. Koutas, whose sixteen years previous service with a bank had been recognised for pension purposes. 30

The respondent on the 17th May, 1978, considered the application of the applicant and rejected it again. This decision of the respondent was communicated to the applicant by letter dated 21st July, 1978, which reads as follows: 35

5 "I have been instructed to refer to the correspondence ending with your letter dated 15th April, 1978, in connection with your request that for pension purposes your twelve years previous service with the Improvement Board of Prodrornos be recognised by the Municipality and to inform you that the Municipal Committee at its meeting of the 17th May, 1978, having correctly considered your application, decided to reject it for the following reasons:

10 (i) Your allegation that at the time of your appointment by the Municipality the then Mayor of Nicosia, the late Them. Dervis, promised you that your twelve years previous service with the Improvement Board of Prodrornos would be recognised by the Municipality, does not stand, since such decision could be taken
15 only by the Municipal Committee and not by a simple promise of the Mayor;

20 (ii) According to the provisions of the Municipal Corporations Law, no appointments are offered conditionally and any such appointment is subject to the approval of the District Officer;

(iii) According to the Pensions and Gratuities Regulations, pension is only granted to the pensionable Municipal personnel only for services rendered to the Municipality".

25 The applicant by letter dated 23rd July, 1978, asked the respondent Municipality to reconsider his case once again. In this letter the applicant referred to the case of the ex Town Clerk Mr. Koutas by name and alleged that the previous sixteen years of service of Mr. Koutas with the Bank of Cyprus were
30 recognised by the Municipality for pension purposes.

The respondent in reply wrote to the applicant the letter of the 30th November, 1978 containing the decision complained of which reads as follows:-

35 "I have been instructed to refer to the correspondence ending with your letter dated 23rd July, 1978 in connection with your request that your claim for recognition of your years of service with the Improvement Board of Prodrornos

be reconsidered anew by the Municipality, and to inform you that the Municipal Committee at its meeting of the 25th September, 1978, reconsidered your claim, in the light of your last letter and decided afresh, having in mind the opinion of the legal advisers of the Municipality on this subject, that it is not possible to approve your claim for the same reasons which are referred to in our letter under the same elements and dated 21st July, 1978". 5

On the 1st day of February, 1979 the applicant filed the present recourse. 10

The respondent Municipality in its opposition, which was filed on the 16th of May, 1979, besides the allegation that the decision complained of was lawfully taken, raises the objection that the letter of the 30th November, 1978, confirms its decision of the 17th May, 1978 which was communicated to the applicant on the 21st July, 1978 and, consequently, the recourse is out of time as it was not filed within the time limit of seventy-five days prescribed by Article 146.3 of the Constitution. 15

On the 30th March, 1983, when this case came on for hearing it was decided, with the consent of both counsel, that the above point raised in the opposition be heard first and determined as a preliminary legal issue. 20

As to what is a new decision it has been decided by this Court in the case of *Lordos Apartotels Ltd. v. The Republic* (1974) 3 C.L.R. 471 and in the recent case of *Costas Georghiou v. The Republic* (1982) 3 C.L.R. 828. In the above cases the following passage from Stassinopoulos on the Law of Administrative Disputes, 4th edition, page 176 has been adopted: 25

"When does a new enquiry exist, is a question of fact. In general, it is considered to be a new enquiry, the taking into consideration of new substantive legal or factual elements, and the used new material is strictly considered, because he who has lost the time limit for the purpose of attacking an executory act, should not be allowed to circumvent such a time limit by the creation of a new act, which has been issued formally after a new enquiry, but in substance on the basis of the same elements. So, it is not considered as a new enquiry, when the case is 30 35

referred afresh to a Council for examination exclusively on its legal aspect or when referred to the Legal Council for its opinion or when another legal provision other than the one on which the original act was based is relied upon
5 if there is no reference to additional new factual elements. There is a new enquiry particularly when, before the issue of the subsequent act, an investigation takes place of newly emerged elements or although preexisting were unknown
10 at the time which are taken into consideration in addition to the others, but for the first time. Similarly, it constitutes new enquiry the carrying out of a local inspection or the collection of additional information in the matter under consideration.”

Counsel for applicant submitted that in the letter of the
15 applicant of the 23rd July, 1978, to the respondent Municipality reference was made for the first time to the case of Mr. Koutas and this constitutes a new fact. Also a new fact was the obtaining by the respondent of a legal advice on the subject as they said in their letter to the applicant dated 30th November, 1978,
20 where the decision complained of is contained.

As regards the submission of counsel for applicant that the case of the ex Town Clerk Mr. Koutas, which allegedly was mentioned for the first time in the letter of the applicant of the
25 23rd July, 1978, is not correct. The case of Mr. Koutas was mentioned also in the letter of the applicant of the 15th April, 1978, to the respondent with the only difference that in that letter no reference was made to Mr. Koutas by name.

Irrespective of the fact that the obtaining of a legal advice by
30 an administrative authority in reconsidering a previous decision does not by itself constitute a new fact, in the present case even if we accept as correct the argument of counsel for applicant on this point, it cannot be considered as a new fact, as such advice is dated 2nd March, 1978, and was before the Municipal Committee at its meeting of the 15th May, 1978 when the decision
35 contained in their letter of the 21st July, 1978, was reached. This is obvious from a mere perusal of the legal advice and the decision of the respondent contained in its letter to the applicant of the 21st July, 1978. So, it is clear from the documentary evidence adduced in these proceedings that no new facts were

submitted to the respondent Municipality by the applicant in addition to the facts on which its decision contained in its letter to the applicant of the 21st July, 1978, was taken. Consequently, the decision of the respondent contained in its letter to the applicant dated 30th November, 1978, the subject matter of the present recourse, is a confirmatory one of its previous decision and is not of an executory nature and, therefore, it cannot be attacked by a recourse under Article 146 of the Constitution. 5

In the result, this recourse fails and is dismissed.

On the question of costs I make no order. 10

Recourse dismissed. No order as to costs.