1985 February 15

[MALACHTOS, J.]

IN THE MATTER OF ARTICLE 146
OF THE CONSTITUTION

MICHAEL AVERKIOU,

Applicant.

v.

THE REPUBLIC OF CYPRUS, THROUGH
THE ACTING DIRECTOR OF SOCIAL INSURANCE.

Respondent.

(Case No. 335/74).

Administrative Law—Administrative acts or decisions—Assessment of the facts on which they are taken—Cannot be the subject of judicial control unless they are proved to be the product of misconception.

This was a recourse against the refusal of the respondent to grant applicant disability benefit under sections 26 and 31 of the Social Insurance Law, 1964 (Law 2 of 1964). The respondent, after taking into consideration, inter alia, the medical reports and the statement of the applicant to the Medical Board, found that applicant's disability pre-existed the date of the coming into force of Law 2/1964 and, consequently, it was not possible to pay any grant to him.

On the sole factual issue whether on the facts before it the respondent authority was entitled to reach the decision complained of:

Held, that the assessment of the facts on which an administrative decision is taken by the authority or organ concerned, cannot be the subject of judicial control by an Administrative Court on a recourse for annulment unless it is proved to be the product of misconception (see *Republic v. Georghiades*

(1972) 3 C.L.R. 594 at pages 692-695 and *Nicou v. The Republic* (1983) 3 C.L.R. 113); that in the present case the respondent authority arrived at the conclusion that the accident which caused the injury to the acoustic nerve of the applicant must have happened prior to 5th October, 1964, the date of coming into force of the Social Insurance Law of 1964, taking into consideration the medical reports, the statement of the applicant to the Medical Board and the letter of the 23rd September, 1972, of his employers that as from 1960 he was exclusively employed as a driller and was not exposed to any noise of explosions or machinery; and that, therefore, it was entirely open to the respondent authority to reach the conclusions it did; accordingly the recourse must fail.

Application dismissed.

Cases referred to:

Oates v. *Earl Fitzwilliam's Collieries Co.* [1939] 2 All E.R. 498;

Fitzsimmons v. *Ford Motor Co. Ltd. (Aeroengines)* [1964] 1 All E.R. 429;

Hughes v. *Lancaster Steam Coal Collieries Ltd.* [1947] 2 All E.R. 558;

Roberts v. *Dorothea Slate Quarries Co. Ltd.* [1948] 2 All E.R. 201;

Republic v. *Georghiades* (1972) 3 C.L.R. 594 at pp. 692-695;

Nicou v. *Republic* (1983) 3 C.L.R. 113.

Recourse.

Recourse against the refusal of the respondents to grant applicant a disability benefit under sections 26 and 31 of the Social Insurance Law, 1964 (Law No. 2/64).

K. Talarides, for the applicant.

M. Florentzos, Senior Counsel of the Republic, for the respondent.

Cur. adv. vult.

MALACHTOS J. read the following judgment. The applicant in this recourse was a miner in the employment of the Hellenic Mining Company from 1956 to 1972 when his employment was terminated. At the time of the termination of his employment the applicant was 55 years of age.

On the 20th July, 1972, he applied to the respondent authority for a grant to him of disability benefit under sections 26 and 31 of the Social Insurance Law, 1964 (Law 2 of 1964), which was then in force.

His case was that in the course of his employment and due to the nature of his work, his hearing capacity in both ears was diminished to the extent of 60% and, according to his allegations, this was due to the noise of explosions, and machinery operating at the time in the mines of the said company.

His application was supported by a medical certificate dated 27th October, 1964, which reads as follows:

> "I certify that Mr. Michael Averkiou was examined by me complaining of dullness of hearing.
>
> The audiogram showed that he is suffering from deafness, particularly as regards the highest tones (about 60% loss). The damage exists in the very same accoustic nerve.
>
> Certainly no one can specify the cause of his dullness of hearing. But since we know that dullness of hearing of this kind and of this causation is aggravated by noise (operating machines, etc.), for this reason I would like to draw your attention on the above fact. Would it not be possible to change his work so as not to be found continuously near operating machines? If not, his hearing gradually will be deteriorated."

This application was rejected by the respondent authority by letter dated 2nd November, 1972, which reads as follows:

"I regret to inform you that your application for a grant due to disability, dated 20th July, 1972, has been rejected because of:

(a) such disability was not due and in the course of employment;

(b) your employer refused to give notice that such an accident took place during your work.

If you are not satisfied with my decision you may appeal to the Court within 75 days as from today."

As against that decision the applicant filed, on the 27th November, 1972, recourse No. 444/72, claiming a declaration of the Court that the decision of the Social Insurance Officer to reject his application for a grant of disability benefit, which was communicated to the applicant by letter dated 2nd November, 1972, is null and void and of no legal effect whatsoever.

At the hearing of the said recourse, on the 7th September, 1973, counsel for the respondent authority made the following statement:

"At this stage, I have observed from the notice of opposition, and in fact from the reasons given in the letter of the 2nd November, 1972, by the Administration, is somewhat different from the line that it will be argued in Court by me, as far as the legal aspect of the case is concerned. Therefore, I place before the Court for consideration by my learned friend on the other side, the proposition that the appropriate authority under the law is prepared to reexamine afresh and reconsider the whole position, my learned friend being at liberty to put before them in writing any additional material and legal argument that he wishes should be borne in mind in reaching a new decision."

Counsel for applicant then stated:

"In view of this statement, Your Honour, I apply for leave to withdraw the present recourse, without prejudice to my client's rights. I shall study the matter

and see whether I have anything to submit to them in writing and if I do so, I shall forward it through my learned friend".

Leave to withdraw the recourse was then given by the trial Judge and the recourse was struck out.

On the 28th September, 1973, counsel for applicant addressed to counsel for the Republic, in the above recourse, a letter setting out a number of considerations as to why the matter should be reconsidered favourably for the applicant.

On the 20th November, 1973, counsel for the Republic forwarded the above letter to the respondent authority together with his comments thereon.

On the 23rd March, 1974, the applicant was examined by the Medical Board which issued the following report:

"We accept that he has loss of hearing in both ears, worse in the left one. The available objective evidence is not sufficient to enable us to give a definite opinion as to the time of its commencement, though, we believe, that the loss of hearing started well before 1964 and it progressed gradually thereafter."

It is significant to note here that the applicant in his relevant written statement to the Medical Board stated the following:

"With reference to my application dated 20th July, 1972, for a grant of disability benefit, I have the following complaints: Both my ears since 1957 are buzzing continuously and I do not hear well."

By letter dated 29th April, 1974, signed by the Assistant Director of the Social Insurance Department, the respondent authority rejected the applicant's claim. This letter reads as follows:

"With reference to your application for a grant due to disability dated 20th July, 1972, I regret to inform you that after reexamination of your case, I decided that your application be rejected since your disability

was not caused during your employment (between 5th October, 1964 and 27th October, 1964), and in the exercise of such employment. This preexisted the date of coming into force of the Social Insurance Law 2/64, (5/10/64), and, consequently, no grant is possible, to be paid to you from the funds of the Social Insurance."

It is clear from the above that the reasons for rejecting the applicant's claims by the respondent authority were the medical certificates, the statement of the applicant to the Medical Board that his ears started buzzing as from 1957 and a letter addressed to the respondent authority by the employers of the applicant dated 23rd September, 1972, where, among other things, it is stated that as from 1960 the applicant was exclusively employed as a driller and was not exposed to any noise of explosions or machinery.

On the 3rd July, 1974, the applicant filed the present recourse, which, as stated therein, is based on the following grounds of law:

1. The sub judice decision was taken without sufficient inquiry in order to ascertain the real facts and, particularly, whether the suffering of the applicant was due to his employment as a miner.

2. There has been faulty procedure in taking the sub judice decision since the respondent failed to refer the applicant for examination by the Medical Board.

3. The sub judice decision was taken after misconception of facts as the suffering of the applicant was really due to his employment as a miner and was caused during such employment and in the exercise thereof.

4. The said decision was taken on the basis of an unlawful reasoning since the claim of the applicant is based on a permanent partial dull hearing of 70% which was caused during his employment as a miner, and in law makes no difference if parts of its percentage preexisted of the coming into force of Law 2/64 since it was a continued situation gradually deteriorating, and

5. The sub judice decision is contrary to the relevant

provisions of the Social Insurance Law, 2/64, and, especially, of sections 26 and 31.

Counsel for applicant in arguing his case before the Court submitted that two points fall for consideration. The first point is whether the injury of the acoustic nerve of the applicant is due to an accident within the meaning of section 26 of the Law, or to a disease in the course of his employment. And the second point whether the injury was caused before 5th October, 1964, when Law 2/64 came into force.

In support of his allegation that the injury of the acoustic nerve of the applicant, was due to an accident, counsel for applicant made reference to a number of cases decided by English Courts on a similar legislation (Workmen's Compensation Act, 1925), particularly in *Oates* v. *Earl Fitzwilliam's Collieries Co.* [1939] 2 All E. R. page 498, *Fitzsimmons* v. *Ford Motor Co. Ltd. (Aeroengines)* [1964] 1 All E. R. 429, *Hughes* v. *Lancaster Steam Coal Collieries Ltd.* [1947] 2 All E. R. 558 and *Roberts* v. *Dorothea Slate Quarries Co. Ltd.* [1948] 2 All E. R. 201.

In the course of the hearing, however, counsel for the respondent authority, after hearing the address of counsel for applicant on the first point, made the following statement:

> "In view of the fact that we have no available evidence as to whether the disability of the applicant was a result of an accident or of any disease, we do not dispute that it may have been due to an accident and we further say that it might have been during the course of his employment but before the coming into operation of the law, 2/64, and I agree that this case be argued only on the second point raised by Mr. Talarides."

Therefore, what remains for consideration is the factual issue of the case as to whether on the facts before it the respondent authority was entitled to reach the decision complained of.

It is a fundamental principle of administrative law that

the assessment of the facts on which an administrative decision is taken by the authority or organ concerned, cannot be the subject of judicial control by an Administrative Court on a recourse for annulment unless it is proved to be the product of misconception. *(The Republic* v. *Georghiades* (1972) 3 C.L.R. 594 at pages 692-695 and *Nicou* v. *The Republic* (1983) 3 C.L.R. 113).

In the present case, as stated earlier on in this judgment, the respondent authority arrived at the conclusion that the accident which caused the injury to the acoustic nerve of the applicant must have happened prior to 5th October, 1964, the date of coming into force of the Social Insurance Law of 1964, taking into consideration the medical reports, the statement of the applicant to the Medical Board and the letter of the 23rd September, 1972, of his employers that as from 1960 he was exclusively employed as a driller and was not exposed to any noise of explosions or machinery.

It was, therefore, entirely open to the respondent authority to reach the conclusions it did.

For the above reasons, this recourse fails and is dismissed. In the circumstances, I make no Order as to costs.

Recourse dismissed with no order as to costs.