

1986 January 25

{LORIS, J.}

IN THE MATTER OF ARTICLE 146
OF THE CONSTITUTION

ANDREAS VORKAS,

Applicant,

v.

THE REPUBLIC OF CYPRUS THROUGH
THE DIRECTOR OF PUBLIC ADMINISTRATION
AND PERSONNEL DEPARTMENT,

Respondent.

(Case No. 124/85).

Constitutional Law—Constitution, Article 28—It safeguards against arbitrary differentiations and does not exclude reasonable distinctions—Public Officers—13th salary—Regulations providing for payment of part of the 13th Salary in case of death or retirement of public officer during the year and for non payment in case of resignation or dismissal during the year—Distinction reasonable. 5

Public Law, domain of—Public Officers—13th salary—Payment of—A matter within the domain of Public Law.

Upon application by the applicant, a Government official, the Public Service Commission granted to him leave for resigning his post with effect from 13.10.84 pursuant to the provisions of s. 50 of the Public Service Law 33/67. 10

After such resignation the applicant applied for payment of his analogy to the 13th salary for the year 1984. His application was turned down on the ground that pursuant to the regulations regulating the payment of 13th salary to Public Servants no such salary is being payable to public servants resigning their post during the year of their resignation. 20

Reg. 6 of the said regulations provides for the payment of an analogy of the 13th salary in case of retirement or death of the public officer, whilst reg. 7 provides that a public officer who either resigns or is dismissed from office shall not be entitled to the payment of 13th salary*.

By means of this recourse applicant challenged the validity of the said refusal on the ground that reg. 7 violates the principle of equality, safeguarded by Article 28 of the Constitution, by differentiating "unreasonably" the position of public officers who have resigned from office during the year from that of public officers who have died or retired during the year.

Counsel for the respondent raised a preliminary objection that the sub judice decision lacks executory character as it is related to a claim of a monetary nature and, therefore, falls within the domain of private law.

Held, dismissing the preliminary objection: The position in Greece is different. In the light of our case law the payment of 13th salary to public officers is a matter of public law, involving the payment of money out of public funds. It follows that the sub judice decision is amenable to the jurisdiction under Article 146 of the Constitution.

Held, further, dismissing the recourse: The issue as to the principle of equality is fully covered by the judgment of the Full Bench of this Court in *The Republic v. Arakian and Others* (1972) 3 C.L.R. 294. Article 28.1 of the Constitution safeguards against arbitrary differentiations and does not exclude reasonable distinctions which have to be made in view of the intrinsic nature of things. The differentiation made as regards payment of 13th salary to Public Officers between retirement and death on the one hand and resignation on the other is not unreasonable. The time of death or time of birth, on which retirement depends, is not regulated by the person concerned, whilst the time of resignation can be regulated by the person concerned, e.g. the applicant in this case could instead of resigning in October 1984 resign on 1.1.85.

Recourse dismissed.

No order as to costs.

* Both Regulations are quoted at pp. 215-216 post.

Cases referred to:

Economides v. The Republic (1980) 3 C.L.R. 219;

Markides v. The Republic, 2 R.S.C.C. 8;

Papaleontiou v. The Republic (1966) 3 C.L.R. 557;

Tsiartzazis v. The Republic (1985) 3 C.L.R. 1; 5

The Republic v. Nishan Arakian and Others (1972) 3 C.L.R. 294.

Recourse.

Recourse against the refusal of the respondent to pay applicant his analogy on the 13th salary for the year 1984 when he resigned from his post as a Government Occulist. 10

K. Talarides, for the applicant.

A. Papasavvas, Senior Counsel of the Republic, for the respondent.

Cur. adv. vult. 15

LORIS J. read the following judgment. The applicant, a Government occultist, who was first appointed in the service on 1st May 1975, applied to the P.S.C. on 25.6.84 (vide Appendix B to the opposition) seeking leave to resign from his aforesaid post. 20

The P.S.C. accepted the aforesaid Application of the applicant pursuant to the provisions of s. 50 of the Public Service Law No. 33/67 and granted leave to him for resigning his post with effect from 13th October 1984; a letter to that effect dated 20.8.84 was addressed by the P.S.C. to applicant's counsel. (Vide Appendix C attached to the opposition.) 25

In answer to a letter addressed by applicants' counsel on 4.10.84 (exh. 3) the Ministry of Finance informed applicant. (exh. 4) that the matter of granting a gratuity to him (under the provisions of the Pensions Law, Cap. 311, as amended by the insertion of s. 7Γ (1)(b) by Law 39/81) was being carried on. 30

On 4.12.84 applicant's counsel addressed another letter (exh. 2) to the Ministry, raising for first time the question of payment to the applicant of his analogy to the 13th salary for the year 1984 (i.e. up to 13.10.84 the date on
5 which his resignation became effective).

On 7.1.85 the Director of Public Administration and Personnel Service addressed a letter to applicant's counsel (exh. 1 attached to the recourse) turning down the request for the payment to the applicant his analogy on the 13th
10 salary for the year 1984, on the ground that pursuant to the relevant regulations regulating the payment of 13th salary no such salary is being paid to public servants resigning from their post during the year of their resignation.

The regulations in respect of the 13th salary are set out
15 in Part A of Appendix A attached to the opposition and they have been approved by the Council of Ministers on 16.3.71 (vide photocopy of the minutes of the meeting of the Council of Ministers of 16.3.71—Decision No. 10326 marked X”).

20 The relevant regulations under No. 6 and No. 7 of Part A read as follows:

«6. Εἰς περίπτωσιν ἀφυπηρετήσεως ἢ θανάτου δημοσίου υπαλλήλου καθ' οἷονδῆποτε χρόνον πρὸ τοῦ Δεκεμβρίου ἐκάστου ἔτους, καταβάλλεται εἰς αὐτὸν ἢ
25 εἰς τὸν νόμιμον προσωπικὸν ἀντιπρόσωπὸν του εὐθύς ἅμα τῇ ἀφυπηρετήσει ἢ τῷ θανάτῳ του ὡς 13ος μισθὸς ποσὸν ἴσον πρὸς τὸ 1/12 τοῦ μηνιαίου μισθοῦ του κατὰ τὸν χρόνον τῆς ἀφυπηρετήσεως ἢ του θανάτου του δι' ἕκαστον συμπληρωμένον μῆνα ὑπηρεσίας.
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7. Δημόσιος υπάλληλος παραιτηθεὶς κατὰ τὴν διάρκειαν τοῦ ἔτους δὲν δικαιούται εἰς τὴν καταβολὴν 13ου μισθοῦ».

(English Translation:

35 “6. In case of retirement or death of a public servant at any time before December each year, an amount equal to 1/12 of his monthly salary at the time of his

retirement or death for each complete month of service shall be paid as 13th salary to him or his lawful personal representative, upon his retirement or death.

7. A public servant who has resigned or has been dismissed during the year is not entitled to the payment of 13th salary.") 5

The applicant being dissatisfied with the sub judge decision, instituted present proceedings praying for its annulment on the ground of unconstitutionality of regulation 7, of the 13th salary regulations cited above, inasmuch as it impugns the "principle of equality" safeguarded by Article 28.1 of our Constitution, by differentiating "unreasonably" the position of public officers who have resigned during the year and are not entitled to the payment of the 13th salary or any part thereof for the year of their resignation, from public officers who have died or retired during the year and are entitled to an analogy of the 13th salary of that year as envisaged by regulation 6. 10 15

The respondent in his opposition has raised the preliminary objection that the sub judge decision lacks executory character and it cannot therefore be made the subject matter of a recourse under Article 146. 20

Elaborating on this preliminary objection, in his oral address before me, learned counsel for the respondent clarified that the sub judge decision lacks executory character as in his submission it is substantially a claim of monetary nature and it falls within the domain of private law. 25

I intend to examine first the preliminary objection in the light of the argument of respondent's counsel before dealing with the substance of the recourse, as the objection in question goes to the root of the jurisdiction of this Court. 30

Learned counsel for respondent elaborating on the preliminary objection submitted that the claim of the applicant is substantially one of a monetary nature and that as such falls within the domain of private law and therefore it is not amenable to the jurisdiction under Article 146. He cited in support cases decided by the Greek Council of State and invited me to find that the gist of the recourse is 35

of a monetary nature. He has also made reference to the case of *Economides v. The Republic* (1980) 3 C.L.R. 219 at pages 223 and 224.

5 I feel that I should state straight away that I fail to comprehend how does the *Economides* case (supra) can be of any help in the present proceedings. The only similarity of that case with the present proceedings is that in the aforesaid case as well as in the present one, a preliminary objection was raised. In that case the preliminary objection
10 was referring to a confirmatory decision which is not of course of executory character; the issue in the present case is whether the claim for 13th salary is amenable to the jurisdiction under Article 146, in view of the allegation that same is not regulated by public law.

15 I have examined the Greek Authorities cited but it must be stated at the outset that I cannot adopt them as the position in Greece is different and furthermore we have decisions of our own, on the point:

20 Thus it was decided as early as 1961 by the then Supreme Constitutional Court in the case of *Chrysanthos Makrides v. The Republic*, 2 R.S.C.C. 8 at p. 12 that "The decision of the Chief Establishment Officer that Applicant should not be granted a gratuity in respect of period A has been made in the exercise of administrative authority
25 in the sense of paragraph 1 of Article 146 of the Constitution. The fact that the challenging of such a decision by the applicant involves financial consequences only, does not take such a recourse outside the scope of Article 146."

30 The aforesaid decision was followed by Triantafyllides J. (as he then was) in the case of *Papaleontiou v. The Republic* (1966) 3 C.L.R. 557, where the following were stated verbatim at pages 560 - 561:

35 "Regarding the second issue, which I have to decide, I have considered it in the light, inter alia of *Makrides and the Republic*, 2 R.S.C.C. 8, and bearing in mind also that the matter of granting a pension to a public officer, even on an ex-gratia basis, is a matter of public law, involving the payment of money out of public funds in accordance with certain well-esta-

blished rules and principles, and that, in particular, in this case, applicant appears to base his claim to a pension on one of his fundamental rights, safeguarded under Articles 6 and 28 of the Constitution, viz. the right of equality—claiming that he is entitled to receive equal treatment as an ex-colleague of his, a certain Mr. E. Papadopoulos, who has allegedly been granted a pension in circumstances similar to those of applicant's; I have, as a result, reached the conclusion that the decision of the Council of Ministers, in question, is a decision coming within the ambit of Article 146 and that, therefore, it could be made the subject of this recourse.”

Even recently in the case of *Tsiartzazis v. Republic* (1985) 3 C.L.R. 1, where the Ministry of Finance refused to pay applicant a gratuity after the termination of his contract of service, it was held that the refusal of the respondent is an executory administrative act, within the domain of Public Law and as such can be the subject of a recourse notwithstanding that it relates to a financial dispute.

It is abundantly clear from the cases cited above that in the instant case, the payment of 13th salary to public officers as well, is a matter of public law, involving the payment of money out of public funds; once therefore in the domain of Public Law is amenable to the jurisdiction under Article 146; the preliminary objection therefore fails and is accordingly dismissed.

Having disposed of the preliminary objection, I shall now proceed to examine the gist of the present recourse.

By way of preamble to such examination I feel that I should repeat what is stated earlier on in the present judgment in respect of the regulations in connection with payment of 13th salary, in view of the fact that the aforesaid regulations were referred to at the hearing as “circulars”: As it was clarified before me at the adjourned hearing of 21.6.85 the regulations in respect of the 13th salary were approved by the Council of Ministers on 16.3.71 (vide photocopy of the minutes of the Council of Ministers of 16.3.71—Decision No. 10326 marked “X”); I hold the

view that their character cannot be altered by the mere fact that in the present case they are contained in a circular of the Ministry of Finance which is appended, for easy reference, as Appendix A attached to the opposition.

5 The issue before me is whether regulation 7. of the 13th salary regulations cited earlier on in the present judgment is unconstitutional in view of the "principle of equality" safeguarded by Article 28.1 of the Constitution, by differentiating, allegedly unreasonably, the position of public
10 officers who have resigned during the year (and are not entitled to payment of the 13th salary or any part thereof for the year of resignation), from public officers who have died or retired during the year (and are entitled to an analogy of the 13th salary of that year) envisaged by regulation
15 6.

Before considering the factual substratum of the issue I consider it pertinent to examine briefly the "principle of equality" set out in Article 28.1 of the Constitution.

The issue is fully covered by the judgment of the Full
20 Bench of this Court in the case of the *Republic v. Nishan Arakian and others* (1972) 3 C.L.R. 294, where the learned President of this Court delivering the unanimous judgment of the Court stated the following inter alia at pages 298-299:

25 "The application of the 'principle of equality' has been considered in *Mikrommatis and the Republic*, 2 R.S.C.C. 125, where, it was stated (at p. 131) that 'equal before the law' in paragraph 1 of Article 28
30 'does not convey the notion of exact arithmetical equality but it safeguards only against arbitrary differentiations and does not exclude reasonable distinctions which have to be made in view of the intrinsic nature of things'; and the *Mikrommatis* case was followed in, inter alia *Panayides v. The Republic* (1965) 3 C.L.R. 107, *Louca v. The Republic* (1965) 3 C.L.R. 383,
35 and *Impalex Agencies Ltd. v. The Republic* (1970) C.L.R. 361.

Valuable guidance can be derived in this respect from decisions of the Greek Council of State

In case 1273/65 it was stated that the principle of equality entails the equal or similar treatment of all those who are found to be in the same situation.... In case 1247/67 it was held that the principle of equality safeguarded by Article 3 of the Greek Constitution of 1952—which corresponds to Article 28.1 of our Constitution—excludes only the making of differentiations which are arbitrary and totally unjustifiable....”

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Turning now to the 13th salary regulations under consideration.

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Regulation 6 provides for the payment of an analogy of the 13th salary in case of retirement or death of the public officer whilst regulation 7 provides that a public officer who either resigns or is dismissed shall not be entitled to the payment of 13th salary.

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Having given the matter my best consideration I have come to the conclusion that the differentiation made between retirement and death on the one hand (regulation 6) and resignation—which is the present case—on the other (regulation 7) is neither unreasonable as submitted by learned counsel of applicants nor is it arbitrary or unjustifiable. A public officer who resigns from his post cannot be said to be in the same situation as one who retires or dies for the following reasons; the age of retirement although regulated by Law, is primarily governed by the time of birth; and it is self evident that neither the public officer not any other person can regulate the time of his birth. If for instance a public officer was born in June he will have to retire in June (when he becomes say 55 or 60).

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The time of death of a public officer, as well as that of any other person cannot be regulated by the person concerned. Anyone of us may die at any time.

The situation of a public officer who voluntarily resigns from his post is obviously different from the case of retirement and death; any public officer may regulate the time of his resignation. He may instead of resigning in October 1984, which is the present case, resign on the 1st January, 1985 in which case he would have been paid his 13th salary

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of the whole year 1984; this is a fortiori so in the case of the applicant who was first appointed in 1975 and must have been presumed to know the conditions of his service and even could have verified the situation before resigning
5 by examining the regulations in respect of the 13th salary which were approved by the Council of Ministers as early as 1971, i.e. four years prior to the appointment of the applicant in the Public Service.

For all the above reasons I find that regulation 7 of the
10 13th salary regulations set out above, is not unconstitutional by differentiating as it does, resignation from retirement or death envisaged by regulation 6, as it does not impugn the "principle of equality" safeguarded by Article 28.1 of our Constitution.

15 In the result present recourse fails and is accordingly dismissed: in the circumstances there will be no order as to its costs.

*Recourse dismissed.
No order as to costs.*