1986 November 13

[SAVVIDES, J.]

IN THE MATTER OF ARTICLE 146
OF THE CONSTITUTION

CHRYSANTHOS KOUDOUNARIS,

Applicant,

v.

THE EDUCATIONAL SERVICE COMMISSION,

Respondent.

(Case No. 458/83).

Educational Officers—Serving on probation—Termination of appointment—The Public Educational Service Law 10/69—Section 30(2)—Final decision of termination taken by Commission before considering applicant's representations—Failure to carry out a due inquiry as contemplated by the said section.

Natural Justice—Right to be heard—Not applicable to administrative measures taken in the public interest, but only to disciplinary measures—Inefficiency as such of an officer—Not a disciplinary matter—In the absence of express provisions to the contrary, no need to afford him an opportunity to be heard before termination of his services.

Administrative Law—Recourse challenging the validity of termination of an Educational Officer serving on probation—Unfavourable postings or transfers in the past allegedly in contravention of Reg. 15 of the Educational Officers (Teaching Staff) (Appointments, Postings, Transfers, Promotions and Related Matters) Reg. 1972—Cannot be relied upon as they were not challenged by a recourse in time.

On the 18.7.83 the respondent decided to inform the applicant, a teacher on probation in elementary education,

of its intention to terminate his services on the ground of unsatisfactory services and invited him to make any representations he would consider necessary till 31.8.83 against such termination.

Apart from the representations, which the applicant made to the Commission, the applicant, also, wrote to the President of the Republic, requesting his intervention in the matter. By letter dated 10.9.83 the President of the Republic informed the applicant that after examination of his case with the Ministry of Education and the Educational Service Commission the termination of applicant's services was inevitable and that the appropriate services had assured him that a continuous engagement as a replacement will be offered to the applicant till his retirement.

The respondent Commission met on the 4.10.83 and decided to terminate the probationary appointment of the applicant as from 1.9.83. Hence the present recourse.

The applicant complained, inter alia, of violations of Reg. 15 of the Educational Officers (Teaching Staff) (Appointments, Postings, Transfers, Promotions and Related Matters) Regulations 1972 in that the Commission had failed to post the applicant in schools of category A or B, and of breach of the rules of Natural Justice and the express provisions of section 30 of the Public Educational Service Law 10/69 in that the Commission failed to consider applicant's representations before taking its final decision in the matter.

Held, annulling the sub judice decision: (1) Any unfavourable postings or transfers in violation, as alleged, of the said Reg. 15 cannot be relied upon by the applicant, as he could have challenged them by a recourse within the time limit provided in Article 146.3 of the Constitution and had failed to do so.

(2) The rules of natural justice do not apply to administrative measures taken in the public interest, but to measures entailing a disciplinary sanction. In the absence of an express provision to the contrary inefficiency as such should not be treated as a disciplinary matter and,

therefore, no opportunity to be heard need be afforded to the officer concerned. (*Pantelidou* v. *The Republic*, 4 R.S.C.C. 100).

(3) In this case there is an express provision in the law (section 30(2) of Law 10/69) setting out the procedure under which the appointment of an educationalist serving on probation can be terminated. Acting in compliance with the section the respondent invited the applicant to make his representations, but, in the light of the material before the Court, the question that arises is whether applicant's representations were in fact taken into consideration at the meeting of the respondent dated 4.10.83 as stated in the relevant minutes.

(4) The letter of the 10.9.83 by the President of the Republic implies that the decision had been taken before the respondent met to examine and consider all relevant material, including applicant's representations. It follows that as the respondent manifested its intention of inevitably terminating the appointment before having a meeting to examine the case and consider applicant's representations as provided by s. 30(2) of Law 10/69, the opportunity afforded to the applicant to make his representations was only a pretext to comply with the law.

(5) In the light of the above the conclusion is that the respondent failed to discharge its duty under s. 30(2) of Law 10/69 and failed to carry out a due inquiry, as contemplated by s. 30(2).

Sub judice decision annulled.
No order as to costs.

Cases referred to:

Kazamias v. *The Republic* (1982) 3 C.L.R. 239;

Pantelidou v. *The Republic*, 4 R.S.C.C. 100;

Rallis v. *The Greek Communal Chamber*, 5 R.S.C.C. 11.

Recourse.

Recourse against the decision of the respondent to terminate applicant's appointment as a teacher in the elementary education.

N. Papaefstathiou, for the applicant.

R. Vrahimi (Mrs.), for the respondent.

Cur. adv. vult.

SAVVIDES J. read the following judgment. The applicant was, at the material time, a teacher of elementary education and till the 1st September, 1983 he was holding the post of a teacher on probation. He was originally appointed as a teacher on probation on the 1st September, 1959. On the 1st September, 1963, his services were terminated by the appropriate authority, having been found as unsatisfactory. He was re-appointed again on probation as from the 1st September, 1964, but again his appointment was terminated on the 1st September, 1965 on the ground of unsatisfactory grading. During the period as from 1970 to 1979, he was employed at several periods on contract and on the 1st March, 1979, he was appointed, once again, as a teacher of elementary education on probation.

On the 26th March, 1981, the respondent Commission after consideration of the confidential reports concerning the applicant, decided that his probationary period should be extended up to the 30th June, 1982, on the ground that his service proved unsatisfactory.

The respondent Commission considered further the position of the applicant at its meeting of the 26th October, 1982 and again extended his probationary period until the 1st March, 1983, for the same reason.

On the 18th July, 1983, the respondent met once again to examine the position of the applicant and decided to inform him of its intention to terminate his services on the basis of section 30 of the Public Educational Service Law, on the ground of unsatisfactory service and invite him to make any representations he would consider necessary till 31.8.1983, against such termination.

A letter communicating the above decision was sent to the applicant on the 19th July, 1983 (blue 121 in exhibit 1 'C'). It emanates from the letter sent by the respondent that the report of the Inspector which was considered by the respondent and mentioned in its minutes of the 18th July, 1983, was brought to the notice of the applicant who, in making his representations against the termination of his services made reference to such report and gave certain explanations concerning the unfavourable comments about him contained in such report.

From what appears in exhibit 1 'C', the applicant by letter dated the 26th August, 1983, addressed to the President of the Republic, requested him to intervene in the matter and prevent the termination of his services. The President of the Republic replied to him by letter dated the 10th September, 1983, as follows:

«Ο Πρόεδρος της Δημοκρατίας κ. Σπύρος Κυπριανού, πήρε το γράμμα σας της 26ης Αυγούστου 1983 και σημείωσε όσα αναφέρετε σχετικά με το επαγγελματικό σας πρόβλημα.

Μου έδωσε οδηγίες να σας πληροφορήσω ότι κατόπιν εξέτασης του θέματος σας με το Υπουργείο Παιδείας και την Επιτροπή Εκπαιδευτικής Υπηρεσίας, ο τερματισμός της υπηρεσίας σας είναι αναπόφευκτος στο παρόν στάδιο. Οι αρμόδιες Υπηρεσίες όμως τον έχουν διαβεβαιώσει ότι θα σας προσφέρεται συνεχής απασχόληση ως αντικαταστάτη μέχρι της αφυπηρέτησής σας.

Διαβιβάζω τους χαιρετισμούς του Προέδρου.»

The English translation reads:

("The President of the Republic Mr. Spyros Kyprianou received your letter of the 26th August, 1983 and noted what is mentioned about your professional problem.

He instructed me to inform you that after the examination of your case with the Ministry of Education and the Educational Service Commission, the termination of your services is inevitable at the present stage.

The appropriate services, however, have assured him that a continuous engagement as a replacement will be offered to you till your retirement.

I convey the greetings of the President.")

The reason that I make reference to the above correspondence is because counsel for the applicant in his address made extensive reference to it in support of his argument that there had been violation of the rules of natural justice in that the respondent had made up its mind to terminate finally the services of the applicant before hearing any explanation from him.

The respondent Commission met on the 4th October, 1983 and decided to terminate the probationary appointment of the applicant as from the 1st September, 1983. The minutes of the respondent, in this respect, read as follows:

"Koudounaris Chrysanthos (P 3042), teacher.

On 18.7.83, the Commission bearing in mind the service reports submitted concerning the above teacher as well as the suggestions of the relevant Director of Education decided on the basis of section 30 of the Public Educational Service Laws 1969 - 1979, to inform him that it intended to terminate his appointment due to unsatisfactory service and to invite him to make any representations he wished against the termination of his appointment.

In fact the teacher submitted to the Commission a letter dated 25.8.1983 (see pages 120 - 112 in File P 3042/2).

The Commission having studied the material in the file of the teacher and having taken into consideration the service reports, the opinion of the relevant Director of Education, and what is contained in his letter, decided on the basis of the provisions of the Law to terminate his probationary appointment as from 1.9.1983".

As a result, applicant filed the present recourse praying for -

(a) Declaration of the Court that the act and/or decision of the respondent to terminate his appointment as a teacher as from 1.9.1983 which was communicated to him by letter of the respondent dated 5.10.1983 is null and void and of no legal effect.

(b) Further and/or in the alternative, a declaration of the Court that the refusal and/or omission of the respondent to confirm the appointment of the applicant in the post of a teacher is null and void and of no legal effect.

In expounding on the grounds of law set out in the application, counsel for the applicant argued, by his written address, that the respondent acted in breach of the rules of natural justice and the express provisions of section 30 of the Public Educational Service Law (Law 10/69) by failing to consider the representations of the applicant against the termination of his appointment before taking its final decision on the matter. The intention of the respondent, in counsel's submission, to terminate the applicant's appointment, had already been expressed before the applicant was asked to make his representations and in any event before the meeting of the 4th October, 1983, when the representations of the applicant were allegedly examined. This is evident, in counsel's submission, from the contents of the letter of the President of the Republic to the applicant, which was obviously written on information supplied by the respondent and the Ministry of Education long before the meeting of the 4th October, when the sub judice decision was taken.

Counsel also submitted that the respondent acted in violation of Regulation 15 of the Educational Officers (Teaching Staff) (Appointments, Postings, Transfers, Promotions and Collateral Matters) Regulations of 1972, as it failed to post the applicant in schools of category A or B and he was serving always in category C schools.

Counsel further contended that the inspections of the applicant by the Inspectors were not properly made, that

there was failure on the part of the Inspectors to render to him any possible assistance as provided by Regulation 7(2) of the Educational Officers (Inspection and Evaluation) Regulations of 1976 and the unfavourable comments contained in the said reports were not brought to his knowledge, in violation of regulations 21(2) and 15 of the same Regulations.

Counsel concluded by submitting that bearing in mind the fact that the termination of services is the most severe sanction that can be imposed on an educationalist, the respondent should have afforded him the opportunity to offer explanations and be heard in the matter and it should have considered the possibility of imposing any less severe sanction and in any event it failed to give any reasons for failing to do so.

Counsel for the respondent, on the other hand, contended that the sub judice decision was properly taken and the inefficiency of the applicant was manifested by the material in the file.

Concerning the alleged breach of Regulation 15, counsel argued that the provisions of the said regulation are not mandatory and that they apply only in the case of first appointment. In any event, counsel submitted, the applicant had accepted those postings or transfers without protest and he cannot challenge them now, after the lapse of considerable time.

In dealing with the alleged violation of the rules of natural justice, counsel for the respondent, submitted that the respondent acted in full compliance with section 30(2) of Law 10/69 by informing the applicant of its intention to terminate his appointment and affording him the opportunity to make his representations against such termination. The representations were made in writing, and the Commission before reaching the sub judice decision took into consideration his representations as well as all relevant material before it.

Concerning the letter of the President of the Republic of the 10th September, 1983, counsel for the respondent

submitted that, such letter is of an informatory character and is not of an executory nature as it emanates from an organ which is not competent under the law to make the appointment of the applicant permanent. Therefore, whatever is mentioned in such letter, cannot be relied upon in support of the recourse, as it lacks an executory character likely to affect the position of the applicant. Furthermore, it should be taken into consideration that such letter was written on the 10th September, 1983, and that by that time the respondent had already before it all necessary material concerning the applicant and, therefore, it could pre-judge its decision; but there was nothing to prevent the respondent when it met on the 4th of October 1983, to take a positive or negative decision on the matter.

I agree with counsel for the respondent that the contentions of the applicant that there has been a violation of Regulation 15 of the Educational Officers (Teaching Staff) (Appointments, Postings, Transfers, Promotions and Collateral Matters) Regulations, 1972, cannot be relied upon in support of this recourse, as any unfavourable postings or transfers of the applicant, as alleged by him, could have been challenged within the time limits prescribed by Article 146.3 of the Constitution, and not ad infinitum. The applicant never challenged such postings or transfers in time and he cannot now complain about violations of section 15, which took place in the past and were not challenged in time.

Before, however, dealing with the other issues posing for consideration in this case, I find it necessary to examine the contention of the applicant concerning any violation of the rules of natural justice or the provisions of section 30 which entitle him to make written representations

The principles as to the application of the rules of natural justice have been expounded my me at length in the case of *Kazamias* v. *The Republic* (1982) 3 C.L.R. 239, and I find it unnecessary to repeat them once again. In *Kazamias* case, reference is made to a series of cases decided by this Court and by the Supreme Constitutional

Court as to the application of the rules of natural justice, and the result of their violation, in which a distinction is drawn between administrative measures taken in the public interest and measures entailing a disciplinary sanction. It is abundantly clear that in the latter case the appropriate authority is bound under the rules of natural justice and, in particular, the principle of *audi alteram partem* to afford the opportunity to the person affected, to be heard either orally or by making his written representations concerning the accusations against him.

Reference is made in *Kazamias* case and in most of the cases referred to therein to the dicta in the early case of the Supreme Constitutional Court, *Maro Pantelidou and The Republic of Cyprus*, 4 R.S.C.C. 100 in which, at pp. 105, 106, we read the following:

> "It should, at this stage, be made abundantly clear that, in the absence of express provision to the contrary, inefficiency, as such, should not be treated as a disciplinary matter and, therefore, no opportunity to be heard need be afforded to the officer concerned before his services are terminated or other action is taken against him for inefficiency; though this, of course, does not absolve the Commission of the duty to make a full examination of all relevant facts before coming to a decision in the matter, as in all other instances of discretionary competence."

The above case was followed in *Stavros Rallis and The Greek Communal Chamber*, 5 R.S.C.C. 11 in which, at page 16, it was held:-

> "In order to determine this issue, the nature of the termination of the services of applicant has to be examined with a view to ascertaining whether or not it was disciplinary. One of the grounds for the said termination was the fact that applicant's level of work was very low. That is clearly not a disciplinary ground (vide *Maro N. Pantelidou and the Republic (Public Service Commission)*, 4 R.S.C.C. p. 100."

Though as it emanates from the above authorities inefficiency as such should not in the absence of express pro-

vision to the contrary be treated as a disciplinary matter entitling a person to be afforded the opportunity to be heard, in the present case there is express provision under section 30 of the Educational Service Law, 1969 (Law 10/69) and in particular sub-section (2) which sets out the procedure under which the appointment of an educationalist serving on probation can be terminated. According to such provision, notice should be given to the educationalist concerned of the intention of the Educational Service Commission to terminate his appointment, setting out the reasons for it and the E.S.C., should invite him to make any representations he wishes against the termination of his service, which the E.S.C. has to examine before taking a final decision for either terminating his appointment or extending his probationary period for a period not exceeding two years as the case may be.

In the present case the respondent acting in compliance with sub-section (2) of section 30 informed the applicant by letter dated the 19th July, 1983, of its intention to terminate his services, on the ground that they were unsatisfactory and invited him to make any representations against such termination till 31.8.1983. The applicant made his written representations against the termination of his services by letter dated the 25th August, 1983. From what emanates from the material before me, the respondent Commission met on the 4th October, 1983, to consider the representations of the applicant and take its decision whether to terminate his services or not. According to the minutes of such meeting, the respondent studied the material in the file of the applicant and having taken into consideration his service reports, the opinion of the Director of Education and also the representations contained in his letter of the 25th August, 1983, decided to terminate his probationary appointment as from the 1st September, 1983.

The question which poses for consideration, in the light of all material before me, is whether the respondent before taking its decision did in fact take into consideration the representations of the applicant and attached due weight on them. From what appears in the letter of the President of

the Republic dated the 10th September, 1983, which was sent to the applicant, the E.S.C. in response to an inquiry from the President of the Republic, informed him that its decision to terminate the appointment of the applicant was inevitable and assured him that instead a continuous appointment as a replacement would be offered to the applicant till his retirement. This implies that the decision had already been taken before the respondent met to examine and consider all relevant material and the representations contained in the letter of the applicant.

I find myself unable to accept the explanation of counsel for the respondent that in informing the President about its final intention to terminate the service of the applicant the respondent Commission had already considered the applicant's representations and decided on the matter, as such contention is not supported by the material before me. On the contrary, from the material before me, it clearly emanates that such decision was taken by the respondent on the 4th October when it studied the representations of the applicant together with all other material before it and reached the sub judice decision. Therefore, bearing in mind the fact that the respondent manifested its intention of inevitably terminating the service of the applicant before having a meeting to examine the case and consider the representations of the applicant as provided by section 30(2) of Law 10/1969, the opportunity afforded to him to make such representations, was only a pretext to comply with the law. If the respondent had not in fact formed such intention, it should have informed the President of the Republic that the matter was still under consideration and a decision was to be taken at a future meeting and not that the termination of the applicant's service was inevitatble, and that an offer was to be made to him of a continuous engagement as a replacement till his retirement.

I, therefore, have come to the conclusion that the respondent failed to discharge its duties under sub-section (2) of section 30 and it expressed its final intention of terminating the service of the applicant before holding a meeting to consider his representations on the matter. As a result it failed to carry out a due inquiry in the matter,

as contemplated by section 30(2) of Law 10/69.

I, therefore, find that the sub judice decision has to be annulled on this ground. Having reached such conclusion, I find it unnecessary to deal with the other matters raised in the recourse.

In the result, the sub judice decision is annulled, but in the circumstances I make no order for costs.

Sub judice decision annulled.
No order as to costs.