

1986 February 19

[LORIS, J.]

IN THE MATTER OF ARTICLE 146
OF THE CONSTITUTION

IOANNIS DEMETRIADES,

Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH
THE MINISTER OF COMMUNICATIONS
AND WORKS,

Respondent.

(Case No. 689/84)

The Motor Transport Regulation Law, 1964 as amended, s.4(2)—Applicant a retired civil servant was appointed Chairman of the Licensing Authority from 21.5.72 upto 18.11.72 at £100 per month—Period of his service repeatedly renewed—No agreement in writing—Said appointment was not an appointment on contract as envisaged by s.40 of The Public Service Law 33/67—Said appointment exclusively regulated by the terms of the act authorising the appointment—Therefore, the applicant was not entitled to a cost of living allowance, 13th salary or gratuity upon his retirement. 5 10

Legitimate Interest—The issue can be raised by the Court ex proprio motu—The free and voluntary acceptance of an administrative act without reservation deprives someone from his right to challenge it by a recourse. 15

The Public Service Law 33/67 s. 40.

The Casual Government Employees Regulations of 21.3.79, Reg. 1.

The Regulations in respect of 13th Salary, Reg. 7, before and after its amendment on 22.3.78.

Words and Phrases: "Omission" in Article 146.1 of the Constitution.

5 The applicant, a retired civil servant, was appointed
Chairman of the Licensing Authority for the period from
22.5.72 up to 18.11.72 on the monthly remuneration of
£100. He was re-appointed to the said post for 20 more,
10 three monthly to six monthly periods, on the same re-
muneration until 30.9.79, when his services were not
renewed.

 After the lapse of four years from 30.9.79 the applicant
put forward for the first time a claim for retrospective pay-
15 ment to him of cost of living allowance on his said re-
muneration for the period he served in the said post, a claim
for 13th salary for each of the years of his said service
and furthermore a gratuity for the above period of his
service in the said post.

 By letter dated 6.10.84 the respondent Minister turned
20 down the applicant's first two claims and by letter dated
20.11.84 he also turned down the claim for gratuity. As
a result the applicant filed the present recourse.

Held, dismissing the recourse: "Omission" in the sense
25 of Article 146.1 presupposes that no action has been taken
by the administration. In this case the Minister took two
decisions covering all matters. It follows that the motion
for relief as to the alleged omission is unfounded.

 (2) The applicant was appointed as Chairman of the
30 Licensing Authority under s. 4(2)* of the Motor Transport
Regulations Law 1964 as amended. It is apparent from
the material before the Court that the said appointment
of applicant does not fall within anyone of the categories
of civil servants envisaged by The Public Service Law
33/67. His appointment was not an "appointment on con-
35 tract" as envisaged by s. 40 of the said law, because

* Quoted at p. 296 post.

there was no agreement in writing, as required by the section. His appointment is a specific assignment regulated exclusively by the terms of the administrative act authorising the appointment. No mention is made therein of any cost of living allowance, 13th salary or gratuity. It follows that the applicant was not entitled to the claims he put forward. 5

(3) Further as he was freely and without reservation accepting his remuneration for 7 years and 4 months, without any claim for cost of living allowance the applicant does not possess a legitimate interest to pursue this recourse as regards such allowance. For the free and without any reservation acceptance of an administrative act deprives someone of his legitimate interest to challenge such an act by means of a recourse. 10 15

(4) The 2nd proviso to Regulation 7 of the Regulations in respect of the 13th salary provided that a pensioner in the Government service will draw a 13th salary on his salary or on his pension whichever of the amounts is bigger. This regulation was amended on 22.3.78 by the deletion of the said proviso. Owing to this amendment the applicant received 13th salary for 1978 and 1979. In the light of the above such payment was irregular. Still when he collected the 13th salary for 1978 and 1979 he made no reservation and raised no claim in respect of the years prior to 1978. It follows that assuming he had a right he was deprived of such right to claim 13th salary for such years. 20 25

(5) The applicant could not and cannot by any stretch of imagination be considered as "Casual Government Employee" within the meaning of Reg. 1 of the Casual Government Employees Regulations of 21.3.79. It follows that the said regulations are not applicable to the present case. 30

Recourse dismissed. 35
No order as to costs.

Cases referred to:

Police Association v. The Republic (1972) 1 C.L.R. 1;

Goulielmos v. The Republic (1983) 3 C.L.R. 883;

5 *HjiConstantinou and Others v. The Republic* (1980) 3
C.L.R. 184;

Constantinou v. The Republic (1974) 3 C.L.R. 416;

Tsiartziazis v. The Republic (1985) 3 C.L.R. 1.

Recourse.

10 Recourse against: A) the refusal of the respondent to
pay applicant (a) cost of living allowance for the period
22.5.1972 up to 30.9.1979 when he was serving as Chair-
man of the Licensing Authority and (b) 13th salary for years
1972 to 1977 B) the refusal to pay a gratuity to applicant
15 on the termination of his above service, on the 30.9.1970.
and C) the omission to effect the payments above referred to.

N. Zomenis, for the applicant.

M. Tsiappa (Mrs), for the respondent.

Cur. adv. vult.

20 LORIS J. read the following judgment. The applicant in
the present recourse prays:

25 (A) For a declaratory judgment to the effect that the
decision of the respondent Minister dated 6.10.84 (vide
Appendix 7 attached to the opposition) whereby the appli-
cant was refused (i) payment of cost of living allowance for
the period 22.5.72 up to 30.9.79 when he was serving as
a Chairman of the Licensing Authority (ii) payment of 13th
salary for the years 1972 to 1977 both inclusive whilst in
the aforesaid service, be declared null and devoid of any
legal effect.

30 (B) For a declaratory judgment to the effect that the

decision of the respondent Minister dated 20.11.84 (vide Appendix 11 attached to the opposition) whereby the applicant was refused payment of a gratuity on termination of his aforesaid services as Chairman of the Licensing Authority on 30.9.79 be declared null and devoid of any legal effect. 5

(C) For a declaratory judgment to the effect that the omission of the respondent to effect payments to the applicant referred to in paragraphs (A) & (B) of the prayer above is null and devoid of any legal effect, and what was omitted ought to be performed. 10

The undisputed facts of the present case are very briefly as follows:

The applicant who retired at his 60th year of age, from the post of Assistant Director of Postal Services was appointed by a decision of the Council of Ministers dated 25.5.72 (vide Appendix 1 attached to the opposition) as Chairman of the Licensing Authority under the provisions of s. 4(2) of the Motor Transport Regulation Laws 1964 as amended, for the period from 22.5.72 up to 18.11.72 on the monthly remuneration (αντιμισθία) of £100.-. 15 20

Applicant was re-appointed in the aforesaid post by the Council of Ministers under the provisions of the aforesaid Laws for 20 more, three-monthly to six-monthly periods, on the same monthly remuneration until 30.9.79 (vide Appendix 2 attached to the opposition), when his services were not renewed. 25

It is significant to note at this stage that the applicant from the time of his original appointment on 25.5.72 and for the whole period in the aforesaid service with the 20 renewals, as aforesaid, until 30.9.79, was receiving his monthly remuneration without any claim whatever on cost of living allowance on his monthly remuneration paid to him. And it was only after the lapse of 4 years from 30.9.1979, when his services were not renewed, when he raised for first time a claim of retrospective payment to him of cost of living allowance on the remuneration he was receiving for the aggregate period of 7 years and 4 months 30 35

he has served as above. (Vide his letter dated 30.9.1983 addressed to the Director-General of the Ministry of Communications and Works in Appendix 3 attached to the opposition).

5 In his aforesaid letter the applicant was also claiming 13th salary for all the years he had served, as above, and furthermore a gratuity for the above mentioned period of service.

10 By a letter dated 6.10.84 (Appendix 7 attached to the opposition) the respondent turned down the claim of applicant in respect of cost of living allowance and informed him that he was not entitled, being a pensioner, to 13th salary up to and including 1977 and that, 13th salary was paid to him for the years 1978 and 1979 owing to change
15 in the relevant decision of the Council of Ministers in respect of 13th salary to which I shall refer later on. in the present judgment.

20 By a letter dated 20.11.84 (vide appendices 11 & 12 attached to the opposition) the respondent Minister turned down the request of applicant for payment of gratuity to him.

Hence the present recourse.

25 Before proceeding further I must point out that it is apparent from the undisputed facts set out above, that motion for relief under (c) above is ill-founded and must be dismissed forthwith as in the present case there were two decisions of the respondent Minister covering all matters (Appendices 7 and 11 attached to the opposition) whilst "omission" in the sense of Article 146.1 "presupposes
30 that no action has been taken by administration in the matter in question" (*Police Association v. The Republic* (1972) 3 C.L.R. 1, *Goulielmos v. The Republic* (1983) 3 C.L.R. 883 at p. 902).

35 As already stated above, the applicant, a pensioner 60 years of age, was first appointed by the Council of Ministers as Chairman of the Licensing Authority under the provisions of s. 4(2) of the Motor Transport Regulation

Laws 1964, as amended, for the period of 22.5.72 up to 18.11.72 at the monthly remuneration of £100.-. Applicant was further re-appointed in the aforesaid post by the Council of Ministers under the provisions of the aforesaid Laws until 30.9.79 when his services were not renewed. 5

In 1972, at the time of applicant's appointment s. 4(2) of the Motor Transport Regulation Law 1964 was reading as follows:

“The Licensing Authority is composed of five members appointed by the Council of Ministers, which specifies the duration of their service. Four of the Licensing Authority's members shall be public servants and the fifth member who will not be a public servant is appointed by the Council of Ministers as Chairman of the Licensing Authority.” 10 15

It is apparent from the material before me that the appointment of the applicant as Chairman of the Licensing Authority does not fall within anyone of the categories of civil servants envisaged by the Public Service Law 1967 (Law 33/67). I hold the view that the aforesaid appointment of applicant is not an “appointment on contract” as envisaged by s. 40 of Law 33/67, as appointment under the aforesaid section requires “agreement in writing” and there was no such an agreement in the case under consideration. In the instant case the appointment of the applicant was a specific assignment for the exercise of statutory duties regulated exclusively by the terms of the administrative act authorising his appointment. The administrative act in question emanated as stated above from the Council of Ministers and as stated therein, the applicant would be receiving only £100.- per month. No mention is made therein of any cost of living allowance to be paid on his remuneration, 13th salary, or gratuity upon non-renewal of his services. (Vide Appendix 1 attached to the opposition for his first appointment and Appendix 3 in respect of 1st renewal—Decision of the Council of Ministers published in Suppl. No. 4 of C.G. 976 of 1.12.72). 20 25 30 35

Therefore the applicant was not entitled to cost of living allowance, 13th salary or gratuity upon non-renewal or

termination of his services, by the terms of the administrative act authorising his appointment. And it is crystal clear that the applicant accepted his aforesaid appointment without any reservation by acting as Chairman of Licensing Authority not only for the 1st period of appointment (22.5.72—18.11.72) but for 20 more periods, when his appointment was renewed under the same terms, up to 30.9.79, the date when his last renewal expired.

Furthermore, the applicant, from the time of his original appointment and for the whole period of his aforesaid service by virtue of 20 renewals up to 30.9.79, was receiving his monthly remuneration without any claim whatever on cost of living allowance; it is therefore obvious and nothing was put forward to the contrary that he was freely and without any reservation accepting his remuneration for 7 years and 4 months i.e. the total period he was serving as Chairman of the Licensing Authority.

And it was only as late as 30.9.83, i.e. 4 years after the non-renewal of his appointment that he raised the present claim for cost of living allowance.

It is well settled that “the free and without any reservation acceptance of an administrative act or decision deprives someone of the right to challenge it by administrative recourse (*Andreas HjiConstantinou & Others v. The Republic*, (1980) 3 C.L.R. 184.)

It is true that this point has not been raised or argued before me, but it is a matter which the Court is bound to raise ex-prorio motu in view of its bearing on the “existing legitimate interest” envisaged by Article 146.2 of the Constitution, a provision which has to be applied in the public interest (*Constantinou v. Republic*, (1974) 3 C.L.R. 416).

As already stated above the applicant was not entitled by virtue of the terms of the administrative act authorising his appointment to 13th salary as well.

Assuming though, that the applicant was not so precluded, and the Regulations in respect of 13th salary were

applicable to his case, according to the Regulations in respect of 13th salary (vide Appendix 6 attached to the opposition) and in particular according to the 2nd proviso of Regulation 7 thereof, a pensioner in the Government service will draw a 13th salary on his salary or on his pension whichever of the amounts is bigger. 5

This was the position with respect to 13th salary up to 22.3.78 when the Council of Ministers by decision No. 16717 of even date, amended the Regulation in question by deleting the 2nd proviso to Regulation 7 above, and thus 13th salary was made payable to "pensioners public servants occupied under any capacity in the Public Service or in Public Utility Corporation in addition to the payment of 13th pension (vide circular No. 461 of the Ministry of Finance dated 20.4.78). 10 15

Owing to the aforesaid amendment 13th salary was paid to the applicant (in addition to the 13th pension he was drawing for the years 1978 and 1979.)

I feel duty-bound to state that such payment of 13th salary for the years 1978 and 1979 was irregularly made, to say the least, as the applicant was not entitled according to the terms of his appointment as aforesaid to the drawing of 13th salary, at all. 20

Still, in the case of 13th salary as well, the applicant received the 13th salary for the years 1978 and 1979 without making any reservation and without raising any claim for 13th salary for the years prior to 1978; the applicant in the circumstances by his unreserved acceptance of 13th salary in 1978 and 1979 was deprived of any right, assuming he had such a right, to claim 13th salary for the years prior to 1978, on the authorities cited earlier on in the present judgment, when I was dealing with the subject of cost of living allowance. 25 30

Before concluding, I shall deal very briefly with the case of *Tsiartziazis v. The Republic*, (1985) 3 C.L.R. 1, cited by applicant in support of the present case. In the first place the *Tziartziazis* case (supra) must be distinguished from the present. In that case it is apparent that the ap- 35

pointment was an appointment on contract under s. 40 of Law 33/67, as a contract in writing was produced "as exhibit 7" as stated at page 6 of the report. As already stated in the present case, there was no contract in writing; 5 the appointment of the applicant in the case under consideration was specific assignment for the exercise of statutory duties regulated exclusively by the terms of the administrative act, authorising his appointment. And the said administrative act, which was accepted unreservedly by the 10 applicant, did not provide either for cost of living allowance, 13th salary, or gratuity.

I cannot subscribe to the proposition that in the absence of any provision in the instrument of appointment, the matter of cost of living allowance, the 13th salary and 15 gratuity, are being regulated by the Regulations of Casual Government Employees of 21.3.1979 (attached to Appendix 13 of the Opposition). In the first place I repeat that it is clear from the particular facts of the case under consideration that the applicant was specifically assigned by 20 the Council of Ministers for the exercise of statutory duties regulated exclusively by the terms of such assignment (vide Appendices 1 & 2 attached to the opposition). On the other hand the applicant could not and cannot by any stretch of imagination be considered as "Casual Govern- 25 ment Employee" within the definition of paragraph 1 of the aforesaid Regulations.

For all the above reasons, the present recourse fails and is accordingly dismissed. In the circumstances, I have decided to make no order as to its costs.

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*Recourse dismissed.
No order as to costs.*