

[TRIANTAFYLLIDES, J.]

IN THE MATTER OF ARTICLE 146 OF THE
CONSTITUTION

PANTELAKIS KYPRIANIDES,
Applicant,

and

THE REPUBLIC OF CYPRUS, THROUGH
THE PUBLIC SERVICE COMMISSION
Respondent,

(Case No. 132/63).

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Administrative Law—Public Officers—Promotions with retrospective effect—Complaint of Applicant against decision of Respondent to promote him to the post of Land Officer, Lands and Surveys Department, with effect only from 1st January, 1963—Decision annulled, as having been taken on wrong principle—Promotion itself not annulled, only decision regarding the date of its effect.

Administrative Law—Recourse against part of a decision, under Article 146 of the Constitution—An applicant, who complains against only part of a decision, is entitled to challenge the validity of that part only, under Article 146.

Public Service Commission—Discretion of—Approach to the question of retrospectivity of promotion of Applicant constitutes, in this case, a defective exercise of the relevant discretion of the Commission, in that it has not been based on all relevant considerations.

Time—Article 146.3 of the Constitution—In the circumstances of this particular case, present recourse is not out of time.

In 1958 Applicant was a Land Clerk, 1st Grade, posted at Limassol. As from the 4th December, 1958, Applicant was instructed to perform the duties of Director of Lands Office at Limassol, by letter dated 2nd December, 1958, and on the 18th December, 1958, "to act as Lands Officer Class II", with effect from the 4th December 1958.

Applicant continued so acting until May, 1963, when he was promoted to the post of Land Officer the two classes of Lands Officer having been amalgamated into one uniform post of Land Officer as from the 1st January, 1963.

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On the 18th May, 1963, Applicant wrote to the Commission and while accepting the offer of promotion, he stated that he was aggrieved by the decision to make his promotion with effect as from the 1st January, 1963, only, and alleged that his promotion ought to have been made with effect as from the date when he was appointed as acting District Lands Officer.

On the 24th June, 1963, the Commission examined the representations of Applicant and dismissed his claim.

Applicant was informed of this by letter dated the 29th June, 1963.

On the 5th July, 1963, Applicant wrote accepting the appointment in question and reserving his rights to challenge the date of his promotion through court proceedings.

On the 8th July, 1963, the Commission formally informed Applicant of his promotion as from the 1st January, 1963.

Applicant retired from the public service on the 31st August, 1963.

This recourse was filed on the 25th July, 1963.

Applicant complains, that the decision of Respondent to promote him to the post of Land Officer with effect only from the 1st January, 1963, is *null and void*; he also seeks a declaration that the omission to make such promotion with effect from, as far as back as, the 4th December, 1958, ought not to have been made.

Held, I. On whether Applicant is entitled to challenge the validity of only part of a decision, under Article 146.

(a) Applicant can take such a course and that this objection of Respondent is not well-founded; in paragraph 4 of Article 146, it is stated that, upon a recourse, the Court may either confirm or *annul* in whole or in part the sub judice act or decision. If the Court has such a power I see no reason why an Applicant, who complains against only part of a decision, should not be entitled to challenge the validity of that part only.

Morsis and The Republic (reported in this Part at p. 1 ante) followed.

II. On whether or not a question of an omission arises :

What is complained of is a definite specific decision of the Commission, taken in the exercise of its discretionary powers and, therefore, no question of an omission could arise.

III. On the objection that this recourse is out of time under Article 146.3.

The Applicant was informed of the final decision of the Commission on the date of effect of his promotion by means of the letter of the 29th June, 1963; such date was later formally repeated in the letter of the Commission dated 8th July, 1963. So, in my view, the time under Article 146(3) should be deemed to have commenced to run, at the earliest, on receipt of the Commission's letter of the 29th June, 1963; therefore, this recourse is clearly within time, having been filed on the 25th July, 1963.

IV. On whether or not Applicant was entitled, in view of his acting service, to commensurate increments in the relevant salary scale.

(a) Though the Commission did address its mind to the question of back-dating the promotion of Applicant, it did not deal with it in sufficient correlation to the issue of the grant of increments to Applicant and left such issue to be raised by Applicant's Head of Department with the Ministry of Finance.

(b) When the Commission decides to promote an officer to a post, in which he has been acting for such a length of time as to give rise to the issue of whether or not his promotion ought to relate back to his acting service or any proper part thereof, as the case may be, and this is to be done, if decided upon, through the grant to such officer of increments above the minimum salary of the salary scale attaching to the post to which he is being promoted, as in the present Case, it is the duty of the Commission to decide the question of such increments, because it is part and parcel of the effect of the promotion itself.

(c) Somehow leaving aside the question of the granting of increments to Applicant, the Commission, in dealing with the date of effect of Applicant's promotion, has failed to pay due regard to a most relevant consideration and has omitted to deal with a most vital aspect of the matter,

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thus bringing about an incomplete and defective exercise of its relevant discretion; consequently it has become necessary to annul its sub judice decision.

Constantinou and the Greek Communal Chamber, (reported in this Part at p. 96 *ante*) followed.

V. As regards costs :

Respondent should pay £30.—against Applicant's costs in these proceedings.

Order : It is hereby declared that the decision of the Public Service Commission to make the promotion of Applicant with effect from the 1st January, 1963, is *null* and *void* and of no effect whatsoever; the promotion itself is not annulled, only the decision regarding the date of its effect.

The Commission has now to reconsider the matter of the date of effect of the promotion of Applicant in the light of this Judgment.

Decision complained of, in so far as it relates to the date of its effect only, declared null and void.

Observation : The reconsideration by the Commission can take place irrespective of the fact that Applicant has retired from the service in the meantime, because it will refer to the situation existing when its sub judice decision, which was annulled, was taken;

Loukas and The Republic (reported in this Part at p. 65 *ante*) distinguished.

Cases referred to:

Morsis and The Republic (reported in this Part at p. 1 *ante*);

Constantinou and The Greek Communal Chamber (reported in this Part at p. 96 *ante*);

Loukas and The Republic (reported in this Part at p. 65 *ante*);

Recourse.

Recourse against the decision of the Respondent to promote applicant to the post of Land Officer, with effect only from the 1st January, 1963, and against the omission to make such promotion with effect as from the 4th December, 1958.

G. Cacoyiannis for the applicant.

M. Spanos, Counsel of the Republic, for the respondent.

Cur adv. vult.

The facts of the Case sufficiently appear in the following judgment delivered by:—

TRIANTAFYLLIDES, J.: By this recourse Applicant complains, in effect, that the decision of Respondent to promote him to the post of Land Officer, with effect only from the 1st January, 1963, is *null* and *void*; he also seeks a declaration that the omission to make such promotion with effect from, as far as back as, the 4th December, 1958, ought not to have been made.

It is convenient, at this stage, to deal at once with two issues which have arisen in this Case:

The first is the allegation in paragraph 2 of the Opposition that the Applicant is not entitled to challenge the validity of only part of a decision, under Article 146 of the Constitution.

It is true that in this Case the Applicant is not challenging the validity of his promotion, as such, but only the date of effect of such promotion.

I have no doubt in my mind that Applicant can take such a course and that this objection of Respondent is not well-founded; in paragraph 4 of Article 146, it is stated that, upon a recourse, the Court may either confirm or annul in whole or in part the *sub judice* act or decision. If the Court has such a power I see no reason why an Applicant, who complains against only part of a decision, should not be entitled to challenge the validity of that part only.

By way of a useful precedent it may be noted that in the case of *Morsis and The Republic* (reported in this Part at p. 1 *ante*), the Applicant had attacked only the date of effect of a

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decision and the Court proceeded to annul only such part of that decision.

Secondly, it has been argued that no question of an omission arises because on the sub judice matter a specific decision has been taken. This argument is correct, in my opinion. What is complained of is a definite specific decision of the Commission, taken in the exercise of its discretionary powers and, therefore, no question of an omission could arise. Claim (2), therefore, of the motion for relief—which clearly appears to have been an alternative one all along—is dismissed accordingly.

The salient facts, leading up to this recourse, are as follows:

In 1958 Applicant was a Land Clerk, 1st grade, posted at Limassol.

On the 4th December, 1958, a certain Mr. Savvides, who was at the time a Lands Officer, took leave prior to his eventual retirement on the 26th February, 1959. As from the 4th December, 1958, Applicant was instructed to perform the duties of Director of Lands Office at Limassol, by letter dated 2nd December, 1958, (*exhibit 1*) and on the 18th December, 1958, it was published in the official Gazette that Applicant was “to act as Lands Officer, Class II”, with effect from the 4th December, 1958.

Applicant continued so acting until May, 1963, when he was promoted to the post of Land Officer—the two classes of Lands Officer having been, in the meantime, amalgamated into one uniform post of Land Officer.

The Commission, which had been dealing with vacancies in Department after Department, came to deal as from 1962 with Applicant’s Department and on the 2nd May, 1963, it considered the filling of existing vacant posts of Land Officer.

As it appears from its relevant minutes (*exhibit 8*) “after considering the qualifications, merits, abilities, experience and seniority of all qualified candidates” decided unanimously to appoint—by way of promotion—nine persons, including Applicant, to the post of Land Officer; in the case of five of them, including Applicant, the appointment was to be with effect as from the 1st January, 1963, and in the case of the other four as from the 1st May, 1963.

The Commission decided also “to inform the Director of

the Department of Lands and Surveys that he could take up the question of the grant of additional increments to the officers promoted with the Ministry of Finance, if he so thought proper”.

A letter was written on the 6th May, 1963, to Applicant, informing him of his promotion, (*exhibit 2*).

On the 18th May, 1963, Applicant wrote back to the Commission and—(see *exhibit 3*)—while accepting the offer of promotion, he stated that he was aggrieved by the decision to make his promotion with effect as from the 1st January, 1963 only, and alleged that his promotion ought to have been made with effect as from the date when he was appointed as acting District Lands Officer.

A further letter, dated 18th June, 1963, (*exhibit 4*) was written by counsel for Applicant to the Commission, asking for a decision on the matter of the date of effect of Applicant's promotion.

On the 24th June, 1963, the Commission met and examined the representations of Applicant and recorded in its relevant minutes (*exhibit 9*) that “the Commission in deciding originally the effective date of promotion of this officer took all relevant facts into consideration. The Commission decided that Mr. Kyprianides should be asked to reply clearly within 15 days as to whether he accepts the promotion as offered to him or not”. It, thus, dismissed Applicant's claim.

Applicant was informed of this by letter dated the 29th June, 1963 (*exhibit 5*).

On the 5th July, 1963, Applicant wrote accepting the appointment in question and reserving his rights to challenge the date of his promotion through court proceedings (*exhibit 6*).

On the 8th July, 1963, the Commission formally informed Applicant of his promotion as from the 1st January, 1963 (*exhibit 7*).

Applicant retired from the public service on the 31st August, 1963.

This recourse was filed on the 25th July, 1963.

During the hearing counsel for Respondent has taken the preliminary objection that this recourse is out of time, under

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Article 146(3), arguing that what is in issue is the decision of the 2nd May, 1963; it was communicated to Applicant by letter of the 6th May, 1963, which was received by Applicant on the 10th May, 1963, as pleaded in paragraph 8 of the facts alleged in support of the Application.

But, in my view, the letter of the 6th May, 1963 cannot be treated as a final decision; Applicant wrote back complaining about the date of effect of his promotion, the Commission considered his representations at its meeting of the 24th June, 1963 and as a result a further letter was addressed to Applicant on the 29th June, 1963. The formal document of appointment of Applicant to the post in question, as from the date complained of i.e. the 1st January, 1963, is the letter of the Commission to Applicant dated 8th July, 1963. His promotion was, later, published in the official Gazette on the 18th July, 1963.

It is to be noted further, that, according to the motion for relief in the Application, Applicant complains against the decision contained in the letter of the 8th July, 1963.

The Applicant was informed of the final decision of the Commission, on the date of effect of his promotion by means of the letter of the 29th June, 1963; such date was later formally repeated in the letter of the Commission dated 8th July, 1963. So, in my view, the time under Article 146(3) should be deemed to have commenced to run, at the earliest, on receipt of the Commission's letter of the 29th June, 1963; therefore, this recourse is clearly within time, having been filed on the 25th July, 1963.

It is useful to consider next what would have been the result had the Commission decided to give effect to the promotion of Applicant as from December, 1958—or any other proper date prior to the 1st January, 1963, such as the 26th February, 1959, when the post of Lands Officer, in which Applicant was acting, fell vacant through the retirement of its previous holder, Mr. Savvides.

According to the relevant evidence of both Mr. Costas Nicolaides, the Budgeting Officer in the Ministry of Finance, and Mr. Andreas Koudounaris, an Accounting Officer posted at the Lands and Surveys Department, which evidence I do accept, I am satisfied that, in view of the fact that Applicant due to his acting capacity had been receiving all along

the minimum salary of the salary scale of the post of Land Officer i.e. £900, a retrospective promotion of his would have resulted in the granting to Applicant, on appointment in 1963, of increments in the relevant salary scale commensurate to his acting service in the post in question.

So the Public Service Commission had to decide in dealing, in the particular circumstances of this Case, with the matter of the date of effect of the substantive appointment of Applicant, whether or not he was entitled, in view of his acting service for nearly four and a half years in the post in question, to commensurate increments in the relevant salary scale.

What did the Commission actually do in this matter?

The picture of the action of the Commission, as formed by the minutes, *exhibits 8 and 9*, is not quite clear; it was, however, completed to a certain extent by the very helpful evidence of Mr. Demetrios Protestos, a member of the Commission.

From the totality of the material before me, I am of the opinion that, though the Commission did address its mind to the question of back-dating the promotion of Applicant, it did not deal with it in sufficient correlation to the issue of the grant of increments to Applicant and left such issue to be raised by Applicant's Head of Department with the Ministry of Finance (see the relevant minutes, *exhibit 8*).

When the Commission decides to promote an officer to a post, in which he has been acting for such a length of time as to give rise to the issue of whether or not his promotion ought to relate back to his acting service or any proper part thereof, as the case may be, and this is to be done, if decided upon, through the grant to such officer of increments above the minimum salary of the salary scale attaching to the post to which he is being promoted, as in the present Case, it is the duty of the Commission to decide the question of such increments, because it is part and parcel of the effect of the promotion itself.

By somehow leaving aside the question of the granting of increments to Applicant, the Commission, in dealing with the date of effect of Applicant's promotion, has failed to pay due regard to a most relevant consideration and has omitted to deal with a most vital aspect of the matter, thus bringing about an incomplete and defective exercise of its relevant

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discretion; consequently it has become necessary to annul its *sub judice* decision. (Vide *Constantinou and the Greek Communal Chamber*, (reported in this Part at p. 96 *ante*)).

Furthermore, to the extent to which the Commission did deal with the question of a retrospective promotion of Applicant, it has done so on wrong principle, for the following reasons, in my opinion:

As stated by Mr. Proestos in his evidence, it was not a question of Applicant not meriting a retrospective appointment, with effect back to the time when he had started acting in the post in question, but it has not been the policy of the Commission to make such retrospective appointments, unless there are specific circumstances militating towards such a course, such as a commitment by Government to this end; and, apparently, the Commission found that no such circumstances existed in the case of Applicant.

Though I might agree to a certain degree with the proposition, expounded by Mr. Proestos in his evidence, to the effect that an acting appointment does not create vested rights in the person concerned, I cannot go so far as to hold that it properly and necessarily follows therefrom that in every case where an acting appointment is subsequently converted into a substantive one, such substantive appointment should not, as a matter of policy, be made to relate back to the acting appointment, unless there exist special circumstances requiring such a course.

In my view, it cannot be a question of rigid policy whether or not a retrospective promotion ought to be made in a case such as the Applicant's, where the acting appointment did not last for the usual reasonably short period required to fill a vacancy, but for nearly four and a half years, and during which period, through no fault of Applicant's, no decision was taken about filling the vacancy in which he was acting all along; this was a matter which ought to have been dealt with on its merits. The Commission may have paid due regard to all relevant factors, as contained in the personal file of Applicant, but in the end it appears to have erroneously based itself not on the particular merits of Applicant's claim to a retrospective promotion, but on preconceived policy.

I am of the opinion that such an approach to the question of the retrospectivity of the promotion of Applicant consti-

tutes, in this Case, a defective exercise of the relevant discretion of the Commission, in that it has not been based on all relevant considerations, and in the result the sub judice decision of the Commission has to be annulled.

For all the reasons stated in this judgment, it is hereby declared that the decision of the Public Service Commission to make the promotion of Applicant with effect from the 1st January, 1963, is *null* and *void* and of no effect whatsoever; the promotion itself is not annulled, only the decision regarding the date of its effect.

The Commission has now to reconsider the matter of the date of effect of the promotion of Applicant in the light of this judgment.

The fact that the acting appointment of Applicant commenced in 1958, before the creation of the Republic on the 16th August, 1960, should not be regarded as an obstacle preventing the Commission from dealing fully with the matter of the date of the effect of Applicant's promotion, if it were to decide to relate it back to any date prior to the 16th August, 1960, because this is not a case where an organ in the Republic is asked to exercise its competence retrospectively, in relation to a period when the Republic did not exist, but a case where an organ in the Republic is asked, while exercising its discretion now, to take into account facts which have existed since before the 16th August, 1960—if, of course, it deems fit so to do.

In this respect it should be pointed out that though the term "retrospective" has been used in this judgment as a conveniently descriptive term, Applicant's case is not really an instance where possible action of the Commission in the present is to have retrospective effect in the sense of affecting the past; it is only an instance where it is open to the Commission, after a proper exercise of its discretion, to take certain action in the present—viz the grant of increments—because of what has taken place already in the past.

The reconsideration by the Commission can take place irrespective of the fact that Applicant has retired from the service in the meantime, because it will refer to the situation existing when its *sub judice* decision, which was annulled, was taken; (see Conclusions from the Jurisprudence of the Greek Council of State, 1929-1959 p. 358). In this respect

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this Case is distinguishable from the case of *Loukas and The Republic* (reported in this Part at p. 65 *ante*), because there the Commission had not, until the retirement of Applicant, dealt with the matter in dispute at all and it could not take cognizance of it, for the first time, after his retirement.

In view of the outcome of the Case it is not necessary to deal with any other issue raised in these proceedings.

Particularly it is not necessary to decide the issue of whether or not under the practice to be derived from relevant provisions in the Colonial Regulations—particularly regulation 33—it was possible or proper to give due retrospective effect to the promotion of Applicant; the Commission never carried the matter of increments far enough so as to bring into play any financial obstacle arising out of the non-availability of the necessary funds or otherwise. It never consulted the Ministry of Finance as to whether any budgetary difficulties would arise (see the evidence of Nicolaidis and Protestos).

Nor is it necessary to determine whether or not Applicant has been discriminated against by not being given a sufficiently retrospective promotion, as it has been done in other cases, because, as already found, Applicant's case has not yet been fully dealt with and, therefore, no comparison with other cases is as yet proper or possible.

Regarding costs I think that it is right that Respondent should pay £30.- against Applicant's costs in these proceedings.

Decision complained of, in so far as it relates to the date of its effect only, declared null and void. Respondent to pay £30.- against Applicant's costs.