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ANDREAS HADJIGEORGHIOU *and* THE REPUBLIC OF CYPRUS, THROUGH THE PUBLIC SERVICE COMMISSION

[TRIANTAFYLLIDES, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

ANDREAS HADJI GEORGHIOU,

Applicant,

and

THE REPUBLIC OF CYPRUS, THROUGH THE PUBLIC SERVICE COMMISSION

Respondent

(*Case No. 146/64*)

Public Officers—Appointments—Decision of respondent Commission to terminate applicant's probationary appointment as an Accounting Officer 2nd Grade Treasury Department—Decision annulled as it was taken by the Commission meeting without a proper quorum

Public Service Commission—Constitution functioning and quorum—Decision of respondent Commission to terminate applicant's probationary appointment in the public service taken at a time when Commission was improperly constituted—Provisions of section 5 of the Public Service Commission (Temporary Provisions) Law 1965 (Law 72 of 1965) not properly applicable to the decision in question

Constitutional Law—Constitution of Cyprus—Doctrine of necessity—Decision of respondent Commission to terminate applicant's probationary appointment in the public service taken at a time when Commission was improperly constituted—Prerequisites for the coming into play of the law of necessity not satisfied in this Case

Necessity—Law of necessity—See above

The applicant in this recourse seeks to annul the decision of the respondent Public Service Commission terminating his appointment in the Public Service as an accounting officer 2nd Grade with effect from the 6th December, 1964.

On the 4th June 1964, the Accountant-General addressed to applicant a letter informing him that during the period of his duty as an Accounting Officer responsible for Bank Reconciliation work in the Accounts Branch applicant

had failed to carry out his duties conscientiously, and stating that it appeared that applicant had purposely prepared statements purportedly showing that the cash book balance of the Government General Account was reconciled with the Ottoman Bank statement for the same Account, whereas applicant must have known that, in fact, this was not so. Applicant was asked, by the said letter, to put forward his explanations.

The Commission after hearing the applicant and the other evidence before it decided on the 14th September 1964 to terminate applicant's service. Against that decision,communicated to him on the 22nd September, 1964, the applicant filed his present recourse on the 3rd December 1964.

The first issue raised by applicant has been that at the time of its decision to terminate applicant's appointment, the respondent Public Service Commission was not properly constituted and another question for consideration was whether or not the decision to terminate applicant's service could be held to be valid notwithstanding the lack of proper quorum at the time of its making on the ground that the Commission had to deal with applicant's case under such exceptional circumstances which rendered its functioning for the purpose, even with a defective quorum, by virtue of the "Law of necessity". In this connection it has been submitted that the Public Service Commission had to go on functioning with its five available members, because the Turkish members were absenting themselves and the two existing vacancies could not, due to the prevailing anomalous situation, be filled in the manner provided for by the Constitution.

Held, (1) *on the 1st Issue :*

(1) Such a matter has already been dealt with by this Court, on first instance, in the cases of *Maratheftis and the Republic*, (1965) 3 C.L.R. p. 576, *Cl. Georghiades and the Republic* (reported in this Part at p. 252, *ante*) and the Case *J. Georghiades and The Republic*, (reported in this Part at p. 317, *ante*); it was held that less than six members of the Commission cannot constitute a quorum enabling the Commission to function validly, and for this reason the Commission when functioning with less than six members is improperly constituted.

(2) It is common ground in this Case that there were only

five members of the Commission present when the decision to terminate applicant's service was taken; because two out of the seven Greek members' seats had already been vacated earlier, one through death and the other through resignation, and there has not been participation of Turkish members since December, 1963.

(3) On the basis, therefore, of the view already adopted by the aforesaid jurisprudence, I find that the decision to terminate the service of applicant was taken by the respondent Commission meeting without a proper quorum ; and as a result such Commission was not properly constituted at the material time. Whether or not the Commission at the material time, was, also, not properly constituted for reasons other than lack of quorum is a question which does not need to be decided in this Case and I leave it open.

(4) While this Judgment was reserved the Public Service Commission (Temporary Provisions) Law 1965 (Law 72/65) was enacted regulating the constitution and quorum of the Commission ; in view, particularly, of the retrospective provisions of section 5 of such Law the hearing of this Case and of, *inter alia*, Case 41/64—*J. Georghiades and The Republic* (*supra*)—was reopened in order to hear arguments on the point, from counsel on both sides.

As in Case of J. Georghiades (*supra*), I have reached the conclusion that the provisions of Law 72/65, and particularly of its section 5, are not properly applicable to the *sub judice* decision of the respondent Commission, on which judgment had been reserved before the enactment of Law 72/65. (See, also *Cl. Georghiades and The Republic*, supra, *at* p. 280).

Held, (II) on the 2nd issue:

(1) In this Case it had to be established by the respondent that the circumstances of the matter were such as to render the functioning of the Public Service Commission, without its proper quorum, valid, *in the particular instance*, because of the " law of necessity ". The existence of an anomalous situation in the Island at the time, which prevented securing the requisite quorum of the Commission, is not sufficient by itself, to establish that in the particular instance of executive action, *viz.* the termination of applicant's service, all the prerequisites existed enabling the Commission to take the sub judice decision by virtue of the " law of necessity " Such prerequisites had to be established as existing also on

the particular occasion, arising out of the circumstances of the particular case.

Because, though due to the said anomalous situation the respondent Commission was prevented from securing a quorum, it did not follow also that, as a result, by virtue of the "law of necessity", it could go on functioning in the usual *course in all cases*; it could only function validly, without a quorum if in the circumstances of a particular case, such as this Case, the prerequisites for the coming into play of the "law of necessity" existed.

(2) It does not seem, indeed, that in this Case the respondent Commission, before dealing with applicant's case, has paused to consider whether or not it could do so by virtue of the "law of necessity", though meeting without a proper quorum; it appears that it dealt with it through continuing to function in the normal course, because possibly of the view that the current anomalous situation in the Island enabled it to do so irrespective of considerations of quorum.

(3) But it is now clear that such course was not validly open to the respondent Commission; this has been laid down already by judicial pronouncement, and it has also been recognized by the Legislature in the preamble to the aforesaid Law 72/65, regulating *pro tempore* for the future the constitution and quorum of the respondent Commission.

(4) The existence of an anomalous situation in Cyprus entitled the Commission to act with a defective quorum only to the extent which this was rendered justifiable and permissible under the "law of necessity" in specific cases; and in this Case I am not satisfied that this was so to the extent of terminating permanently applicant's service.

(5) In the light of all the foregoing the sub judice decision of the Commission has to be declared *null and void* and of no effect whatsoever.

Sub judice decision annulled.

No order as to costs.

Cases referred to:

Mozoras and the Republic (1965) 3 C.L.R. p. 458;

Maratheftis and the Republic (1965) 3 C.L.R. p. 576;

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Cl. Georghiades and the Republic, reported in this vol. at p 252 *ante* ;

J. Georghiades and the Republic reported in this vol. at p 317 *ante* ;

Attorney-General v. *Ibrahim and Others* 1964 C.L.R. p. 195.

Recourse.

Recourse against the decision of the Respondent to terminate Applicant's appointment in the Public Service.

L. Papaphilippou, for the Applicant.

L. Loucaides, Counsel of the Republic, for the Respondent.

Cur. adv. vult.

The following Judgment was delivered by:-

TRIANTAFYLLIDES, J.: The Applicant, in this recourse, seeks a declaration that the decision of the Respondent Commission-communicated to him on the 22nd September, 1964, and contained in a letter dated the 17th September, 1964, addressed to him by the said Commission—by virtue of which Applicant's appointment in the public service was terminated, is null and void and of no effect whatsoever.

The relevant facts, as found by me on the material before me, are as follows:-

Applicant had been in the public service as an Accounting Officer, 2nd grade, in the Treasury since the 14th August, 1961, (see *exhibit* 1).

As from the 1st April, 1962, he was appointed to the said post on an established basis; he was put on probation for a period of two years, (see *exhibit* 2).

On the 4th June, 1964, the Accountant-General, addressed to Applicant a letter informing him that during the period of his duty as an Accounting Officer responsible for Bank Reconciliation work in the Accounts Branch, Applicant had failed to carry out his duties conscientiously, and stating that it appeared that Applicant had purposely prepared statements purportedly showing that the cash book balance of the Government General Account was reconciled with the Ottoman Bank statement for the same Account, whereas

Applicant must have known that, in fact, this was not so. Applicant was asked, by the said letter, to put forward his explanations; (see *exhibit* 3).

On the 9th June, 1964, a reminder was sent to Applicant for the purpose, (see *exhibit* 4).

On the 17th June, 1964, Applicant replied to the complaints made against his work. He stated that he regretted very much the discrepancies regarding the Reconciliation Statements and said that they were due to the very heavy duties which he had been asked to perform, (see *exhibit* 5). At the end of this letter, Mr. Stavros Nathanael, an Accountant in the Treasury, who was a superior of the Applicant, made a note confirming that he had had occasion in the past to commend Applicant's work, initiative and persistence.

On the 10th July, 1964, the Public Service Commission addressed a letter to Applicant informing him that it was contemplating the termination of his probationary appointment because of the irregularities committed by him in connection with the preparation of Bank Reconciliation Statements during his probationary period; Applicant was requested to appear before the Commission on the 20th July, 1964, in order to put before it any representations he might wish to make in connection with the matter.

Applicant appeared, as a result, before the Commission on the 20th July, 1964, and he stated to it his version in relation to the complaints against his work, and he answered questions put to him by Commission members; then the Commission adjourned consideration of its decision, (see *exhibit* 10).

On the 14th September, 1964, the Commission reached the conclusion that it had been persuaded, on the evidence before it, that the whole behaviour and action of Applicant in dealing with his work in preparing Bank Reconciliation Stetements showed inefficiency, incompetence and behaviour which was tainted with untrustworthiness and that Applicant had tried within his knowledge to falsify accounts; that Applicant's said behaviour showed that he was not a suitable officer for permanent retention in the Service. The Commission did not accept his explanation about pressure of work and decided not to confirm Applicant's probationary appointment, and terminated it as from the 6th December, 1964, (see *exhibit* 11).

On the 17th September, 1964, Applicant was informed in writing by the Commission of the termination of his service, as above, (see *exhibit* 7).

On the 29th September, 1964, Applicant wrote to the Respondent Commission asking that the decision against him should be reconsidered, (*exhibit* 8). On the 21st October, 1964, he was informed in writing that no cause existed for such reconsideration, (see *exhibit* 9).

Applicant filed this recourse on the 3rd December, 1964.

The first issue that has been raised in these proceedings has been that, at the time of its decision to terminate Applicant's appointment, the Public Service Commission was not properly constituted.

When this issue was argued before the Court on the 25th May, 1965, both counsel referred to the fact that the same issue was already sub judice in other proceedings before the Court—and particularly in recourse No. 93/64, *Mozoras and The Republic* (1965) 3 C.L.R. p. 458.

As the said case of *Mozoras* was taken on appeal before the Appellate Revisional Jurisdiction of this Court, and it was possible that, thus, the said issue would be dealt with in a final manner, the Judgment in the present Case has been deferred in the meantime. Eventually the *Mozoras* case was disposed of on the 29th April, 1966 (judgment reported in this part at p. 356 *ante*) without having become necessary to deal therein with the issue of the proper constitution of the Commission. I shall, therefore, proceed now to deal with this question for the purposes of this Judgment:

Such a matter has already been dealt with by this Court, on first instance, in the cases of *Maratheftis and The Republic,* (1965) 3 C.L.R. p.576, *Cl. Georghiades and The Republic* (reported in this part at p. 252 *ante*) and Case 41/64, *J. Georghiades and The Republic,* (reported in this part at p. 317 *ante*); it was held that less than six members of the Commission cannot constitute a quorum enabling the Commission to function validly, and for this reason the Commission when functioning with less than six members is improperly constituted.

It is common ground in this Case that there were only five members of the Commission present when the decision

to terminate Applicant's service was taken, because two out of the seven Greek members' seats had already been vacated earlier, one through death and the other through resignation, and there has not been participation of Turkish members since December, 1963.

On the basis, therefore, of the view already adopted by the aforesaid jurisprudence, I find that the decision to terminate the service of Applicant was taken by the Respondent Commission meeting without a proper quorum; and as a result such Commission was not properly constituted at the material time. Whether or not the Commission at the material time, was, also, not properly constituted for reasons other than lack of quorum is a question which does not need to be decided in this Case and I leave it open.

While this Judgment was reserved the Public Service Commission (Temporary Provisions) Law 1965, (Law 72/65) was enacted regulating the constitution and quorum of the Commission; in view, particularly, of the retrospective provisions of section 5 of such Law the hearing of this Case and of, inter alia, Case 41/64 (supra) was reopened in order to hear arguments on the point, from counsel on both sides.

As in Case 41/64 (supra), I have reached the conclusion that the provisions of Law 72/65, and particularly of its section 5, are not properly applicable to the sub judice decision of the Respondent Commission, on which judgment had been reserved before the enactment of Law 72/65. (See also *Cl. Georghiades and The Republic,* supra, at p. 280).

There remains next the question of whether or not the decision to terminate Applicant's service could be held to be valid, notwithstanding the lack of proper quorum at the time of its making, on the ground that the Commission *had* to deal with Applicant's case under such exceptional circumstances which rendered its functioning for the purpose, even with a defective quorum, valid, by virtue of the "Law of necessity".

The prerequisites for reliance on the "Law of necessity" have been gone into in the case of the *Attorney-General v. Ibrahim and others,* 1964 C.L.R. p. 195 and need not be discussed here again.

As stated in *Cl. Georghiades and The Republic* (supra)

the existence of a situation bringing into play the "law of necessity" has to be specifically alleged.

In the present Case, it has been submitted in this respect that the Public Service Commission had to go on functioning with its five available members, because the Turkish members were absenting themselves and the two existing vacancies could not, due to the prevailing anomalous situation, be filled in the manner provided for by the Constitution.

The "law of necessity" cannot, however, validate, by way of omnibus effect, all and any steps taken during the currency of a particular emergency; it has to be established that the prerequisites for its coming into play did exist in relation to the specific act, *legislative* or *executive*, which has been made in the context of an emergency and the validity of which it is sought to uphold by virtue of the "law of necessity".

In this Case it had to be established by the Respondent that the circumstances of the matter were such as to render the functioning of the Public Service Commission, without its proper quorum, valid, *in the particular instance*, because of the "law of necessity". The existence of an anomalous situation in the Island at the time, which prevented securing the requisite quorum of the Commission, is not sufficient, by itself, to establish that in the particular instance of executive action, viz. the termination of Applicant's service, all the prerequisites existed enabling the Commission to take the sub judice decision by virtue of the "law of necessity". Such prerequisites had to be established as existing also on the particular occasion, arising out of the circumstances of the particular case. Because, though due to the said anomalous situation the Respondent Commission was prevented from securing a quorum, it did not follow also that, as a result, by virtue of the "law of necessity", it could go on functioning in the usual course *in all cases;* it could only function validly, without a quorum, if in the circumstances of a particular case, such as this Case, the prerequisites for the coming into play of the "law of necessity" existed.

Though one might, at first sight, say that the Commission *had* to deal with the question of Applicant's appointment, in the light of the irregularities in his work which had come to light, I have not been satisfied by Respondent that the prerequisites for the coming into play of the "law of necessity" were satisfied in this Case; a final measure—such as the

termination of the service of Applicant—cannot be considered as being compatible, in the circumstances of the present Case, with the said prerequisites; it went beyond the necessity of the occasion. It was open to the Commission to deal *pro tempore* with the question of Applicant's service by extending his probationary period; and it is to be noted that the Accountant-General, Applicant's Head of Department, did recommend this course to the Commission initially. Or, if a really sinister view were to be taken of Applicant's intentions behind the irregularities in his work, he could at once be proceeded against disciplinarily and be interdicted, so as to keep him out of harm's way until the Public Service Commission could validly deal in a final manner with his case. That much only could have been warranted by the "law of necessity" in the particular circumstances of this Case.

It appears, anyhow, that, in this Case, the view was taken that Applicant's intentions behind the said irregularities did not warrant his immediate removal from any contact with Treasury work; so, more than five months were allowed to elapse between the date when the matter in question came to be dealt with for the first time and the date when it was decided to dismiss Applicant, and he was allowed to continue working in the meantime.

In the circumstances, the *de facto* extension of Applicant's service, without confirmation to his post, which commenced from the 1st April, 1964,—after the two years' probationary period ended—and lasted while his case was examined, could have been turned formally into an extension of his probationary service until the Commission were in a position to decide the matter with proper quorum.

It does not seem, indeed, that in this Case the Respondent Commission, before dealing with Applicant's case has, paused to consider whether or not it could do so by virtue of the "law of necessity", though meeting without a proper quorum; it appears that it dealt with it through continuing to function in the normal course, because possibly of the view that the current anomalous situation in the Island enabled it to do so irrespective of considerations of quorum.

But it is now clear that such course was not validly open to the Respondent Commission; this has been laid down already by judicial pronouncement, and it has also been

recognized by the Legislature in the preamble to the aforesaid Law 72/65, regulating *pro tempore* for the future the constitution and quorum of the Respondent Commission.

The existence of an anomalous situation in Cyprus entitled the Commission to act with a defective quorum only to the extent which this was rendered justifiable and permissible under the "law of necessity" in specific cases; and in this Case I am not satisfied that this was so to the extent of terminating permanently Applicant's service.

In the light of all the foregoing the sub judice decision of the Commission has to be declared null and void and of no effect whatsoever.

In the circumstances of this Case I do not think it proper to express a view on any other of the issues raised before me, because I do not wish to anticipate any decision of the Commission which it may take on dealing afresh with the matter. Of course, anything advanced before me may properly be placed before the Commission and be taken into account by it, so long as it relates to facts existing when it came to reach its sub judice decision.

Regarding costs, I have decided to make no order as to costs in view, inter alia, of the ground on which this recourse has succeeded.

Sub judice decision annulled.

No order as to costs.