

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

NICOS ARKATITIS AND OTHERS, (No. 2),

Applicants,

and

THE REPUBLIC OF CYPRUS, THROUGH
THE PUBLIC SERVICE COMMISSION,

Respondent.

NICOS
ARKATITIS
AND OTHERS
(No. 2)
v.
REPUBLIC
(PUBLIC SERVICE
COMMISSION)

(Case No. 26/66).

Public Officers—Promotions—Validity—Promotions by way of secondment of Interested Party to the post of Examiner of Accounts, 2nd grade, Audit Office—That is to say two grades above his own—Consideration of Interested Party as a candidate for such promotion, as well as his actual promotion to such a post contrary to law i.e. contrary to basic principles of administrative law and in excess and abuse of powers—In the absence of any legislative provision to the contrary effect, no public officer may be promoted for more than one grade at a time—Even if, however, it were to be held that the Respondent Commission was properly entitled to treat Interested Party as a candidate for the aforesaid post—Then again it has acted in excess and abuse of powers in the instant case, in promoting him over the head of Applicants who were Examiners of Accounts 3rd grade—This exceptional course could only have been justified for most cogent reasons which ought to have been recorded—Whereas none appears in the sub judice decision—Which, thus, is defective for lack of due reasoning—In any event, this was a case where only vast and outstanding superiority in merit of the Interested Party as compared with the Applicants could justify the promotion of Interested Party in preference of Applicants—But not only such superiority was not found and recorded, but, on the material before the Court, it appears that the Applicants and the Interested Party were all of the same average standard.

Administrative Law—Decisions contrary to law i.e. contrary to basic principles of administrative Law—Decisions taken in excess and abuse of powers—Promotions—Promotions of public officers for more than one grade at a time not allowed in principle—Reasoning—Due reasoning of administrative decisions—See above.

Basic Principles of Administrative Law—Decision contrary to such principles is a decision contrary to law within Article 146 1 of the Constitution—See, also, above

Excess and abuse of powers—See above

Promotions—Promotions of public officers for more than one grade at a time, not allowed unless there is an express legislative provision to the contrary—See, also above under Public Officers

*Administrative Decisions—Administrative decisions contrary to Law *ie* to basic principles of administrative law—Reasoning of administrative decisions—And recording of such reasons*

Reasoning—Due reasoning of administrative decisions—Lack of such reasoning may amount to a defect of the relevant decision which must be annulled—See also, above under Public Officers.

Vacancies—'First entry and promotion post'—Advertising of the vacancies in such posts may be dispensed with— Contra now under section 31(1) of the Public Service Law, 1967 (Law No 33 of 1967)

Advertising—Advertising vacancies—See immediately above.

By this recourse the five Applicants, who all hold the post of Examiner of Accounts, 3rd grade, in the Audit Office, attack the promotion (by way of secondment) to the post of Examiner of Accounts, 2nd grade, of the Interested Party, Georghios Epiphaniou, which was decided upon by the Respondent Public Service Commission, on the 6th December, 1965. The Interested Party at the time of his said promotion was only an Assistant Examiner of Accounts *ie* he was holding a post a grade lower than the Applicants, Examiners of Accounts, 3rd Grade (*supra*). The said post of Examiner of Accounts, 2nd grade, is a "first entry and promotion" post, but the Public Service Commission proceeded to effect promotions thereto without advertising the vacancies, such a course was quite properly open to the Respondent Commission at the time if it were of the view that there were suitable candidates already in the service (N.B. Now under section 31(1) of the Public Service Law, 1967 (Law No 33 of 1967), it would appear that the vacancies in question would have to be advertised in any case). With regard to the merits of the Applicants and the Interested Party, it does not appear that on the material before the Court (such as the confidential reports and the evidence of the Acting Auditor-General) there existed any superiority of the Interested Party over the Applicants.

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In annulling the promotions complained of, the Court:—

Held. (1) The consideration of the Interested Party as a candidate for promotion to a post two grades above his own as well as his eventual promotion to such a post was clearly not possible, as being contrary to law; such a course constituted, also, an excess and abuse of powers of the Respondent Commission. The action of the Commission in this case was contrary to basic principles of administrative law and the notions of proper administration, because, in the absence of express legislative provision to that effect, no public officer may be promoted for more than one grade at a time (see Conclusions from the Jurisprudence of the Greek Council of State 1929–1959 p. 346; Kyriakopoulos, Greek Administrative Law, 4th ed., Vol. 3, p. 315 n. 32; and the decisions of the Greek Council of State 512/1950, Vol. 1950A p. 451, at p. 452, and 457/1955, Vol. 1955A p. 613, at p. 615).

(2) Even if, however, I were to hold that the Commission was properly entitled to treat the Interested Party as a candidate for the vacancies in question, I would still find that it has acted in excess and abuse of its powers in promoting him (the Interested Party) to the post of Examiner of Accounts, 2nd grade, over the heads of the five Applicants who were at the time Examiners of Accounts, 3rd grade, for any of the following two reasons:

(A) This exceptional course could only have been justified by most cogent reasons which ought to have been recorded by the Commission in its relevant decision; and none appears therein; thus the *sub judice* decision is, also, defective for lack of due reasoning, and would have to be annulled for this reason, too.

(B)(a) This was, indeed, a case in which mere comparatively greater suitability was not sufficient to justify promoting the Interested Party in preference to the Applicants who were already one grade higher up than him in the public service and who were *prima facie* suitable for promotion—otherwise the vacancies in question would and should have been advertised.

(b) What was required to justify the promotion of the Interested Party in preference to the Applicants would only have been a vast, and outstanding and striking superiority in merit of the Interested Party as compared with the Applicants (always assuming that the Interested Party could have been considered at all as a candidate). But, such superiority not only was not found and recorded by the Commission, but, on the material

before the Court, does not appear, at all, to have existed, all candidates being, more or less, of the same average standard.

(c) Thus, the Interested Party was promoted without proper grounds having either been recorded or existed.

(3) For all the foregoing reasons the promotion by way of secondment of the Interested Party as aforesaid, is hereby declared to be null and void and of no effect whatsoever, as being contrary to law (*i.e.* basic principles of administrative law) and in excess and abuse of powers.

Sub judice decision annulled.

Cases referred to:

Decisions of the Greek Council of State:

No. 512/1950 in Vol. 1950A p. 451, at p. 452, *applied*;

No. 457/1955 in Vol. 1955A p. 613, at p. 615, *applied*.

Recourse.

Recourse against the validity of the promotion of the interested party to the post of Examiner of Accounts, 2nd grade, in preference and instead of the Applicants.

A. Triantafyllides, for the Applicants.

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

L. Clerides, for the Interested Party.

Cur. adv. vult.

The following Judgment was delivered by:—

TRIANATAFYLLIDIS, J.: By this recourse the five Applicants, who all hold the post of Examiner of Accounts, 3rd grade, in the Audit Office, attack the promotion to the post of Examiner of Accounts, 2nd grade, of the Interested Party, Georghios Epiphaniou, which was decided upon by the Respondent Public Service Commission, on the 6th December, 1965 (see its relevant minutes, *exhibit* 4).

The Interested Party, on being notified of the present proceedings, declared, at first, that he did not wish to appear separately herein, but later, during the course of the hearing, he applied for leave to take part in the proceedings through counsel of his own, for the protection of his interests; though his application

was quite belated it was, nevertheless, granted in the interests of justice.

One of the issues which were raised by counsel for the Interested Party was that the Interested Party was not promoted to the post concerned, but was only temporarily seconded.

In the circumstances of the present Case I am quite satisfied that though the term used in the relevant minutes of the Commission (*exhibit 4*) is "seconded", in substance and in fact this is not a case of a temporary secondment in its true sense, such as is provided for by General Order II/3.8, but it is a case where a secondment has been resorted to as an initial step in the course of, and as part and parcel of, the permanent promotion of the Interested Party to the post concerned.

Counsel for Respondent has been treating right through the proceedings, the secondment of the Interested Party as being, in effect, a promotion.

Also, the Acting Auditor-General, Mr. Stathis, while giving evidence in this Case, has himself used the term "promotion" in relation to the filling of the vacancy concerned, and no question was put to him by counsel for the Interested Party in an attempt to bring out that this was in fact a case of a secondment as a mere temporary measure.

The history of events leading up to the *sub judice* decision is shortly as follows:

The Commission decided to fill existing vacancies in the post of Examiner of Accounts, 2nd grade, in the Audit Office of the Republic, through promotions. The said post is a "first entry and promotion post", but the Commission proceeded to effect promotions thereto without advertising the vacancies; such a course was quite properly open to it at the time, if it were—as apparently it was—of the view that there were suitable candidates already in service; now, under section 31(1) of the recently enacted Public Service Law, 1967 (Law 33/67), it appears that the vacancies in question would have to be advertised in any case.

Once the existing vacancies in the post of Examiner of Accounts, 2nd grade, were to be filled by way of promotion, the merits of the Examiners of Accounts, 3rd grade, who were qualified for promotion, were considered by the Commission, on the basis of the Confidential Reports on them.

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It was decided, further, by the Commission, to treat, also, as a candidate for the purpose the Interested Party, who at the time was only an Assistant Examiner of Accounts *i.e.* he was holding a post a grade lower than the Examiners of Accounts, 3rd grade. The Interested Party had been emplaced in the post of Assistant Examiner of Accounts on the 15th October, 1965 (see his personal file, *exhibit* 10(e)); such emplacement was made under section 16 of the Transfer of Exercise of Competence of the Greek Communal Chamber and the Ministry of Education Law, 1965. (Law 12/65), when by virtue of such Law the Interested Party was transferred to the public service from the service of the dissolved Greek Communal Chamber.

As recorded by the Commission in its relevant minutes (*exhibit* 4): "Under the Chamber, Mr. Epiphaniou, held the post of Auditor, 3rd grade, and the next higher post under the Chamber for which he could be considered for promotion was that of Auditor, 2nd grade. This post was equivalent to the post of Examiner of Accounts, 2nd grade, in the Audit Office. The Commission having regard to these facts decided to consider Mr. Epiphaniou as a candidate for the post of Examiner of Accounts, 2nd grade, along with the Examiners of Accounts, 3rd grade." No other Assistant Examiners of Accounts were treated as candidates.

Thus the vital question which falls to be decided is whether or not the Commission was properly entitled to treat the Interested Party as a candidate for the vacancies concerned, and to promote him to one of them, once it had decided to fill such vacancies through promotions only.

Having considered the matter I have reached the conclusion that the action of the Commission was contrary to basic administrative law principles and the notions of proper administration, because, in the absence of express legislative provision to that effect, no public officer may be promoted for more than one grade at a time; (see Conclusions from the Jurisprudence of the Greek Council of State 1929-1959 p. 346; Kyriakopoulos on Greek Administrative Law, 4th ed., vol. 3, p. 315 n. 32).

It is, also, useful, on this point, to refer to two relevant decisions of the Greek Council of State: In case 512/1950 (vol. 1950A p. 451, at p. 452) it has been held that, in accordance with a general principle of public service law, all promotions are made for only one grade (α...συμφώνως πρὸς τὴν γενικὴν

ἀρχὴν ἐν τῷ ὑπαλληλικῷ δικαίῳ καθ' ἣν πᾶσα προαγωγή τελεῖται κατὰ ἓνα βαθμὸν...»); and in case 547/1955 (vol. 1955A p. 613 at p. 615) it was held, likewise, that under the principles of public service law and administrative law a promotion for more than one grade at a time was, in the absence of clear legislative provision to that effect, not possible («ἀντίκειται δι' ἀφ' ἑτέρου ἢ πρᾶξις αὕτη καὶ εἰς τοὺς κανόνας τοῦ δημοσιούπαλληλικοῦ καὶ τοῦ διοικητικοῦ δικαίου καθ' οὓς —πλὴν ἀντιθέτου σαφοῦς τοῦ Νόμου διατάξεως—οὔτε προαγωγή εἰς βαθμοὺς πλείονας τοῦ ἐνὸς δύναται ἐκάστοτε νὰ διενεργῆται...»).

Thus, the consideration of the Interested Party as a candidate for promotion to a post two grades above his own was clearly not possible, as being contrary to law; and, a fortiori, his eventual promotion to such a post was contrary to law, too; and such a course constituted, also, an excess and abuse of powers of the Respondent Commission.

Counsel for the Respondent, though admitting that the course adopted by the Commission was an exceptional one, tried to justify it by relying, *inter alia*, on General Order II/1.14. But it is well settled, by now, that General Orders cannot be regarded as legislation, and in any case I can find nothing in the aforesaid General Order which appears to provide for a two-grades-at-a-time promotion.

Nor can it be said that the circumstances of the service career of the Interested Party, as set out in the relevant minutes of the Commission, would in any way justify the course adopted by the Commission: The Commission had emplaced the Interested Party in the post of Assistant Examiner of Accounts; against such emplacement he had protested by letter dated the 3rd November, 1965 (see *exhibit* 9); the Commission did nothing to remedy the position by emplacing the Interested Party in the post of Examiner of Accounts, 3rd grade—if it thought that his protest was a justified one; then, when the Commission came to fill by way of promotions the vacancies in the post of Examiner of Accounts, 2nd grade, it had to act in accordance with proper principle and it could not suddenly decide, contrary to such principle, to treat the Interested Party as a candidate, and promote him two grades at a time to one of such vacancies, in an effort to meet a situation personal to the Interested Party; the promotions made on the 6th December, 1965, to the post of Examiner of Accounts, 2nd grade,

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were neither the proper occasion nor the proper method for the remedying of any hardship that the Interested Party possibly suffered through force of circumstances; personal interests of public officers, however rightful, cannot override the notions of proper administration.

Even if, however, I were to hold that the Commission was properly entitled to treat the Interested Party as a candidate for the vacancies in question, I would still find that it has acted in excess and abuse of powers in promoting him to Examiner of Accounts, 2nd grade, from the post of Assistant Examiner of Accounts, over the heads of Examiners of Accounts, 3rd grade, such as the Applicants. This exceptional course could only have been justified by most cogent reasons which ought to have been recorded by the Commission in its relevant decision; and none appear therein; thus, the *sub judice* decision is, also, defective for lack of due reasoning, and would have to be annulled for this reason, too.

This was, indeed, a case in which mere comparatively greater suitability was not sufficient in order to justify promoting the Interested Party in preference to the Applicants who were already one grade higher up than him in the public service and who were *prima facie* suitable for promotion—otherwise the vacancies in question would, and should, have been advertised. What was required to justify the promotion of the Interested Party in preference to the Applicants was outstanding and vast superiority in merit of the Interested Party as compared with the Applicants (assuming that the Interested Party could have been considered at all as a candidate).

Such superiority of the Interested Party not only was not found and recorded by the Commission in its relevant decision (*exhibit 4*), but, on the material before the Court, does not appear, at all, to have existed: The Confidential Reports on the Interested Party and on the Applicants (see *exhibits 10(a)–10(e)*) were all, more or less, of the same average standard; and the evidence of the Acting Auditor-General, Mr. Stathis, as to what he told the Commission in support of the candidature of the Interested Party, does not bear out a case of outstanding and vast superiority of the Interested Party over the other candidates. (The relevant evidence of Mr. Stathis was admitted in spite of an objection of counsel for the Applicants; the contents of my then Ruling* need not be repeated herein, but are adopted hereby).

* *Note:* Ruling published in this Part at p. 29 *ante*.

Thus, the Interested Party was promoted without proper grounds having either been recorded or existed.

For all the foregoing reasons I cannot but hold that the promotion, by way of secondment, of the Interested Party, to the post of Examiner of Accounts, 2nd grade, should be declared to be null and void and of no effect whatsoever, as being contrary to law (*i.e.* basic principles of administrative law) and in excess and abuse of powers. The filling of the vacancy thus created is a matter to be reconsidered by the Commission in the light of this Judgment.

The Interested Party has my sympathy, because it appears possible that he may have been prejudiced in his prospects of advancement through the dissolution of the Greek Communal Chamber (see *exhibit 3*). If, when his just annulled promotion to Examiner of Accounts, 2nd grade, was decided upon, his complaint (see *exhibit 9*) against his emplacement as Assistant Examiner of Accounts had not been finally dealt with by the Commission—and the Commission, after his promotion, took the view that it was no longer necessary, in view of his promotion, to deal with his said complaint—then, now that such promotion has been annulled, the Interested Party's aforesaid complaint will, of course, have to be dealt with and it is up to the Commission to decide what is the right course to adopt in the matter; on this point, which is in any case outside the ambit of this recourse, I can express no opinion in this Judgment.

Regarding costs I find that this is a Case in which the Applicants are entitled to costs against the Respondent, which I assess at £25; I do not grant them full costs because some of the costs of these proceedings occurred through the unsuccessful objection taken by them to the evidence of the Acting Auditor-General; and in this respect I have to make a corresponding order for costs against the Applicants and in favour of the Interested Party for an amount of £10.

*Sub judice decision annulled.
Order as to costs as aforesaid.*

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