

[A. LOIZOU, J.]
IN THE MATTER OF ARTICLE 146 OF THE
CONSTITUTION

AFXENTIOS K. AFXENTIOU,

Applicant,

1973
May 21
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AFXENTIOS
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v.
PUBLIC SERVICE
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and

THE PUBLIC SERVICE COMMISSION,

Respondent.

(Case No. 78/72).

Public Officers—Promotions—Promotion with retrospective effect—Promotion to the post of Chief Economic Officer in the Ministry of Finance—Refusal to give retrospective effect to said promotion a valid one—The case does not come within the exceptions to the general rule of non-retrospectivity of administrative decisions—The creation of this new post of Chief Economic Officer by the Budget Law, 1971 (Law No. 6 of 1971) as from the beginning of that year, cannot by itself be considered as either expressly or by implication authorising the respondent Commission to fill it retrospectively—Nor was there any other indication in the Budget Law from which one might infer an implied authorisation to make the promotion in question retrospective—Moreover, the fact that the applicant was asked inter-departmentally to, and did perform the duties of the post before his selection for the post does not amount to an acting appointment under section 44(4) of the Public Service Law, 1967 (Law No. 33 of 1967) and it is not sufficient to constitute the authorisation required by law for retrospective effect to be given to a promotion—Nor was the combined effect of the creation of the post by the Budget Law as from the 1st January, 1971, coupled with the circumstances of this case sufficient to justify the respondent Commission to give to the said promotion retrospective effect as from that date—No question of discrimination arises in the present case which is clearly distinguishable from other cases of promotions made with retrospective effect (Panayides v. The Republic (1972) 3 C.L.R. 467, distinguished).

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Promotions—Have as a rule to be made prospectively—Exceptions to the rule of non-retrospectivity—See further supra.

Administrative acts or decisions—The rule of non-retrospectivity—Exceptions to the rule—The present case not within the said exceptions.

Retrospectivity of administrative acts—The rule against—The exceptions.

The applicant by this recourse prays for a declaration that the decision of the respondent Public Service Commission dated the 14th December, 1971, not to make his promotion to the post of Chief Economic Officer in the Ministry of Finance with retrospective effect as from January 1, 1971, was null and void and of no effect whatsoever. One of the main interests of this case is that that *sub judice* decision was taken by majority (3 to 2) against the *ad hoc* legal advice of the Attorney-General to the effect that this is a case within the exceptions to the general rule of non-retrospectivity of administrative decisions. The learned Judge of the Supreme Court upheld the decision of the respondent and dismissed the recourse holding, contrary to the opinion of the Attorney-General, that the respondent Commission was right in refusing to give retrospective effect to the aforementioned applicant's appointment-promotion.

The facts of the case are briefly as follows :

The applicant was holding the post of Senior Economic Officer in the Ministry of Finance. By the Budget for 1971 (which was enacted into a Law (Law No. 6 of 1971) on February 27, 1971), the post of Chief Economic Officer, together with a number of other new posts, was created. The scheme of service for the said new post was approved by the Council of Ministers on May 6, 1971. The respondent Commission promoted the applicant to the new higher post of Chief Economic Officer on June 16, 1971, with effect as from the 1st July 1971. An offer was made to the applicant on June 18, 1971. On June 29, 1971, the Director-General of the Ministry referring to the said offer wrote a letter to the Chairman of the respondent Commission and requested that the said promotion be made retrospectively as from the 1st January, 1971, the date on which the said post was created by the Budget of 1971, because the applicant

by a departmental arrangement was performing the duties specified for such higher post as from 1st January, 1971. Eventually the Director submitted to the Chairman a legal opinion of the Attorney-General in support of his request. Finally, the Commission met on December 14, 1971 and by majority (3 to 2) refused to accede to the Director's request and to "back-date" the promotion as from January 1, 1971. This decision of the Commission was duly communicated to the applicant on February 4, 1972 and it is on the basis of this communication that the present recourse was filed on March 31, 1972.

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It was argued by counsel for the applicant that the said decision of the Commission amounted to :-

- (a) violation of the intention and authorisation of the legislator to the appropriate Authority that the said post should be filled retrospectively as it appears from the Budget Law, 1971 and the relevant circumstances.
- (b) discrimination between the applicant and the officers in the Department of Civil Aviation who were promoted with retrospective effect as from the first of the year, the relevant posts having been created by subsequently enacted Supplementary Budget Laws.
- (c) violation of the rule for giving to promotions retrospective effect when this is justified by the nature of the existing circumstances and for the purpose of avoiding injustice to the officer concerned.

The learned Judge felt unable to accept this argument and dismissed the recourse; and distinguishing the present case from the case *Panayides v. The Republic* (1972) 3 C.L.R. 467, held that there is nothing which would justify in the circumstances any departure from the rule of non-retrospectivity of administrative decisions; and that there is nothing discriminatory in the *sub judice* decision, the circumstances of the other cases relied upon by counsel for the applicant being quite different from the case in hand.

Held. (1). The creation of this new post of Chief Economic Officer by the Budget Law (Law No. 6 of 1971) of the 27th February, 1971, as from January 1, 1971, could not by itself be considered as amounting to an express statutory provision authorising the respondent Commission to fill it retrospectively;

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nor was there any other indication in the Budget Law from which one might infer an implied authorisation to make the promotion in question retrospectively.

- (2) Moreover, the fact that the applicant was asked inter-departmentally to, and did perform the duties of the post before his selection for the post does not amount to an acting appointment under section 44(4) of the Public Service Law, 1967 (Law No. 33 of 1967) and is not sufficient to constitute the authorisation required by law for retrospective effect to be given to a promotion.
- (3) Nor was the combined effect of the creation of the post by the Budget Law as from the 1st January, 1971, coupled with the other circumstances of the case sufficient justification for the respondent Commission to depart from the general rule of non-retrospectivity by giving retrospective effect to the promotion under consideration.
- (4) Finally, there is nothing discriminatory in the *sub judice* decision as set against the cases of promotion made with retrospective effect in the Department of Civil Aviation relied upon by counsel for the applicant. These cases have to be distinguished from the present one. There, the re-organization of a number of Government Departments had been the subject of negotiations between the Government and the Civil Service and it had been promised that an agreed settlement would have retrospective effect as from the beginning of the year in question.

As a result, the Council of Ministers approved the necessary bill which was laid before the House of Representatives in April or May for the appropriation of the required funds as from the beginning of that year, that is to say, before even laying the bill before the House. Clearly these cases are distinguishable from the instant case. I find, therefore, that no question of discrimination arises (*Panayides v. The Republic* (1972) 3 C.L.R. 467, *distinguished*).

Recourse dismissed.

Cases referred to :

Panayides v. The Republic (1972) 3 C.L.R. 467, (*distin-
guished*);

Decisions of the French Council of State: C.E. Sieur
de Saivre, 28/7/1971, Rec. 462; C.E. Lesueur,
11/1/1952, Rec. 29.

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Recourse.

Recourse against the decision of the respondent not to make the appointment of the applicant as Chief Economic Officer in the Ministry of Finance retrospectively as from the 1st January, 1971.

K. Talarides, for the applicant.

A. Triantafyllides, for the respondent.

Cur. adv. vult.

The following judgment was delivered by :-

A. LOIZOU, J.: The applicant by the present recourse prays for a declaration that the decision of the Public Service Commission (hereinafter to be called "The Commission") dated the 14th December, 1971 not to make his appointment as Chief Economic Officer in the Ministry of Finance retrospectively as from the 1st January, 1971, was null and void and of no effect whatsoever.

The facts of the case are briefly as follows :-

The applicant was holding the post of Senior Economic Officer in the said Ministry. By the Budget for 1971 which was laid before the House of Representatives on the 3rd December, 1970 and enacted into a law (Law No. 6 of 1971) on the 27th February, 1971, the post of Chief Economic Officer, together with a number of other new posts, was created. The scheme of service for the said new post was approved by the Council of Ministers on the 6th May, 1971 and thereupon the Director-General of the Ministry of Finance (hereinafter to be referred to as the "Director-General") informed the Commission that the Minister of Finance had approved the filling of the vacancy in the post of Chief Economic Officer and requested the Commission to proceed accordingly. As the said post was a first entry and promotion post, the Com-

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mission decided that the vacancy in question should be advertised in the official Gazette. This was done on the 21st May, 1971, under Notification No. 837 allowing for the submission of applications until the 5th June, 1971.

In response to the said publication only one application was received by the Commission, namely, that of the applicant who possessed all the qualifications required for appointment to the said post and had long administrative experience in the Public Service together with experience on matters of economic studies and research, particularly on matters of public finance.

The Director-General strongly recommended him for appointment to this post by his letter of the 29th May, 1971 (*exhibit 1, blue 10*) which accompanied the applicant's application. In addition to the praise of the applicant's ability, it was mentioned therein that in actual fact the applicant had been performing the duties of Chief Economic Officer since the 1st January, 1971 in addition to his own duties, a fact that he was described "to have done cheerfully and without grumble, although it meant for him the sacrifice of his leisure and that of his family".

The Commission at its meeting of the 16th June, 1971 decided that as the applicant was known to the Commission from a previous interview, there was no need for him to be invited for an interview and he was promoted to the post of Chief Economic Officer with effect from the 1st July, 1971. An offer was made to the applicant on the 18th June, 1971 (*exhibit 1, blue 14*). On the 29th June, 1971 the Director-General wrote to the Chairman of the Commission; he referred to the said offer and requested that the promotion be made retrospectively as from the 1st January, 1971, the date on which the said post was created, because Mr. Afxentiou had performed the duties specified for the said post as from the 1st January, 1971. On the same day the applicant himself wrote to the Chairman of the Commission a letter, accepting the offer for his promotion and requesting them that his appointment be made retrospectively again as from the 1st January, 1971. The Commission considered this request at its meeting of the 11th September, 1971. The relevant passage of the minute of the Commission for that meeting (*exhibit 1, blue 17*), reads as follows :-

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"In accordance with Kyriacopoulos' Greek Administrative Law (Part II, pages 385 - 386) and the legal advice given by the Attorney-General of the Republic in his letter No. 34(c) 1961/2 of 15.3.1971, an administrative act cannot in principle be made retrospectively. This principle has already been accepted by the Supreme Court. There are, however, certain exceptions to this principle which were enumerated in the above referred documents and the case of Mr. Afxentiou does not fall within these exceptions. The Attorney-General, Mr. Tornaritis, has made it clear to the Chairman at a recent meeting that the performance of the duties of a post by an officer does not fall within these exceptions and does not give rise to any right to the officer concerned for retrospective appointment.

Bearing in mind all the above, the Commission decided that Mr. Afxentiou's request for the back-dating of his promotion to the post of Chief Economic Officer be turned down."

On the 29th September, 1971 the applicant and the Director-General were informed of the aforesaid decision of the Commission (*exhibit* 1, blues 19 & 20).

The legal advice referred to in the aforesaid passage, was given by the office of the Attorney-General in respect of the reorganization of the Department of Civil Aviation and not in respect of the particular case under consideration, but it summed up the position regarding the exceptions to the rule against retrospectivity.

On the 21st October, 1971 the Director-General wrote a lengthy letter to the Attorney-General setting out the facts relevant to the present case—copy of the legal advice hereinabove referred to was also attached thereto—and asked his legal advice as to whether the facts of the present case did not justify it to be treated as falling within the exceptions to the rule against retrospectivity.

On the 20th November, 1971 the Attorney-General of the Republic replied by letter to the Director-General with a copy to the Commission. He reiterated therein that an administrative act, subject to certain exceptions, could not in principle be made with retrospective effect and added

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that in case of appointments their retrospectivity had been accepted when such intention resulted from the law. (See Decisions of the Greek Council of State 29/50, 1787/52 referred to in Kyriacopoulos Greek Administrative Law, 4th edition, vol. 2, page 400, Notes 27 and 28, C.E. 28.7.1971, *Sieur de Saivre*, Rec. 462) or whether such retrospectivity to the post could be implied from the circumstances (*Odent Contentieux Administratif* 1965 - 1966, p. 1218) or whenever the non-retrospectivity to the post would result in the creation of a legal vacuum (c.f. C.E. *Lesueur* 11.1.1952 Rec. p. 29) or would obstruct the function of the Public Service (*Letournour*: Le principe de la non-rétroactivité des actes administratifs) or would cause inequity to a public officer (*Auby*: Incompetence "ratione temporis" *Revue du droit public et de la science politique* 59 (1953) pp. 49 & 52).

The Attorney-General concluded that from the fact that the post was created by the Budget Law of 1971 as from the 1st January, 1971, the intention of the legislator was that this post could be filled retrospectively and that the administrative act in execution of this, could be given retrospective effect. Furthermore, he stated that as the officer in question had been performing the duties of the post with effect from the 1st January, 1971, it could be supported that this case fell under the aforesaid exceptions to the rule. He finally said that the principle established by the provisions of section 44(4) of the Public Service Law (No. 33 of 1967) supported fully the retrospective appointment in this case.

On the 22nd November, 1971 the Director-General wrote to the Chairman of the respondent Commission referring to the aforesaid legal advice and asked them that in the light thereof, the promotion to the post of Chief Economic Officer might then be made retrospectively from the 1st January, 1971. The Commission met on the 14th December, 1971 and considered the said request. Their decision is to be found in the minutes of this meeting, *exhibit* 1, blues 26 and 27. In so far as material, it reads as follows :-

"The Commission reconsidered thoroughly all the facts of this case in the light of the Attorney-General's recent legal advice and decided by majority of

3 votes to 2 (the Chairman and Mr. Y. Louca dissenting) that the case of Mr. Afxentiou does not fall within any of the exceptions enumerated above and, therefore, the request for the back-dating of Mr. Afxentiou's promotion to the post of Chief Economic Officer be turned down.

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Although the Chairman and Mr. Y. Louca has some doubts as to whether this case may be covered by the legal advice given by the Attorney-General in his letter No. 34(c) 1961/2 (I.T.) of 20.11.71, yet they decided to follow it, as it was given specifically on the facts of the case of Mr. Afxentiou. In any case the Chairman and Mr. Y. Louca want to make it clear that a mere performance of the duties of a post alone, does not give any right to an officer to be appointed to that post retrospectively."

This decision of the Commission was communicated to the Director-General on the 4th February, 1972 and it is on the basis of this communication that the present recourse was filed on the 31st March, 1972.

A number of preliminary legal objections has been raised on behalf of the respondent, in addition to the grounds of their opposition to the merits of the recourse.

The application is based on three grounds of law which are briefly to the effect that the decision of the Commission amounted to —

- (a) violation of the intention and authorization of the legislator to the appropriate Authority that the filling of the said post be made retrospectively as it appears from the Budget Law, 1971 and the relevant circumstances;
- (b) violation of the rule for giving to promotions retrospective effect when this is justified by the nature of existing circumstances and for the purpose of avoiding injustice to the interested party; and
- (c) discrimination between the applicant and the officers in the Department of Civil Aviation who were promoted with retrospective effect as from the 1st of the year, the positions of which were

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created by subsequently enacted Supplementary Budget Laws.

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I find it convenient to deal first with the merits of the case.

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The contention of the respondent has been that the Budget Law by which this post was created could not be considered as either expressly or by implication authorizing the Commission to give retrospective effect to the promotion in question, nor that such authorization could be inferred from the circumstances of the cases, or that any injustice would be caused to the applicant if he was not so promoted. With regard to the promotions in the Department of Civil Aviation, it has been claimed that it was an entirely different and irrelevant matter. In fact, it may be stated here that promotions with retrospective effect were made in respect of the Department of Ports as well on the same principle as they were done in the case of the Department of Civil Aviation. One of such promotions came before me and is reported as *Panayides v The Republic* (1972) 3 C.L.R. 467. In the said case it was held that the Supplementary Budget Law was enacted and used as the legislative media for the purpose of the reorganization of the service and the creation of new posts. The provisions therein for funds for such posts retrospectively from the beginning of the year, that is to say five months prior to the promulgation of the said law, was a clear provision that promotions to these posts which were in effect reorganization of already existing posts, were intended to be made with retrospective effect.

That case has to be distinguished from the present one. There, the re-organization of a number of Government Departments had been the subject of negotiations between the Government and the civil service and it had been promised that an agreed settlement would have retrospective effect as from the beginning of the year in question. As a result, the Council of Ministers approved the necessary bill which was laid before the House of Representatives in April or May for the appropriation of the required funds as from the beginning of that year, that is to say, before even laying the bill before the House, a further ground for distinguishing *Panayides's* case (*supra*) from the one under consideration. I find therefore that no question of discrimination arises.

A Budget Law, as such, is prospective in character. It is expected to be adopted by the House of Representatives from the first day of the financial year to which it relates. On account of this, the provisions made therein, including the creation of new posts and the money required to meet such purposes, normally cover the whole of the year. If it is not so adopted, the House of Representatives may, under Article 168.3 of the Constitution, by a resolution, authorize the meeting of any expenditure required for a period not exceeding one month at any one time, but in any event not exceeding two months in the aggregate, from the consolidated fund or other public funds, as they may consider essential for the continuance of the public services shown in the budget, until the expiration of such period. Therefore, the creation of this new post could not by itself be considered as amounting to an express statutory provision authorizing the Commission to fill it retrospectively.

Furthermore, there is no other indication in the said Budget Law from which one might infer an implied authorization to make the promotion in question retrospectively. The fact that the applicant was asked inter-departmentally to perform the duties of the post which was to be created, and before his selection for the post by the Commission—the appropriate organ entrusted by the Constitution with the task of promotions—is not sufficient to constitute the authorization that the law requires to exist before retrospective effect is given to a promotion, nor, in my view, the combined effect of the creation of the post by the Budget Law as from 1st of the year coupled with the circumstances of the case was sufficient justification for the Commission to give to the promotion retrospective effect, nor was it such as to call for doing equity to the officer concerned. The duties assigned, as they were, to him by his Department, had given him an opportunity to show his abilities which might have been to his advantage had there been other candidates for the same post.

Regarding the question whether there has been such a delay in the filling of the post as it should not be left to operate against the officer, it may be observed that in the light of what has been hereinabove set out, the prescribed procedure was followed at a reasonable pace.

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Needless to say that this principle regarding delays normally arises in cases where a candidate has successfully competed in the examinations for a post and there has been a delay in finalizing his appointment, which is not our case.

In all the circumstances, the *sub judice* decision of the Commission is correct.

Before concluding, I would like to refer to section 44(4) of the Public Service Law, 1967 (No. 33 of 1967) which is the only statutory provision that might, on the face of it, appear to have some bearing in the case. In my view, it is not applicable, because by its provisions the only instance where a permanent promotion may be made retrospectively, is when an officer is promoted to the office in which he has been acting and such appointment will be made as from the date on which he was appointed to act, or the date on which the vacancy occurred, whichever is the latter. This is not the case under consideration. The applicant was not the holder of an acting appointment.

For the aforesaid reasons, this application should fail. This outcome, however on the merits, renders, in my view, unnecessary the determination of the preliminary points raised by the applicant.

In the result the recourse is dismissed, but in the circumstances I make no order as to costs.

*Application dismissed;
no order as to costs.*