1973
June 18
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KYROS DEMOSTHENOUS
v.
REPUBLIC (THE EDUCATIONAL SERVICE COMMITTEE)

[A. LOIZOU, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

KYROS DEMOSTHENOUS,

Applicant,

and

THE REPUBLIC OF CYPRUS, THROUGH THE EDUCATIONAL SERVICE COMMITTEE,

Respondent.

(Case No. 345/71).

Promotions—Elementary Education—Promotions or appointments to the post of Inspector of Elementary Education for general subjects—Merit, qualifications and experience—Annual confidential reports and recommendations of the Inspector concerned—Section 35(2) and (3) of the Public Educational Service Law, 1969 (Law No. 10 of 1969)—In assessing merit factors other than said reports and recommendations can be taken into consideration—Holding of written examinations a proper course—Paramount duty in selecting condidates whether for appointment or promotion is to select the most suitable from amongst the qualified candidates—See further immediately herebelow.

Promotions—Seniority—Striking superiority—Seniority not being in favour of the applicant—Onus cast on him to show that he had a striking *superiority over the (senior) persons appointed in preference to him—Such burden not discharged in the present case—Mere superiority not sufficient—On the totality of the material before them it was reasonably open to the respondent Committee to take the* sub judice *decision—Consequently, the contention that the respondent Committee acted in abuse or excess of power or contrary to law, fails.*

Appointments and promotions—Distinction—Sections 23, 25, 26, 28, 35 of said Law No. 10 of 1969.

Administrative acts or decisions—Due reasoning should contain all the elements necessary for the ascertainment of

the legality of the decision concerned—Cf. immediately herebelow.

Collective organs—Minority views—Need not be duly reasoned —So long as the majority decision (which is the only executory one) is duly reasoned—Dissenting member may ask that his views be recorded in the Minutes—Section 8(4) of said Law No. 10 of 1969.

Words and Phrases—"Promotion"—"Appointment"—In the Public Educational Service Law, 1969 (Law No. 10 of 1969), section 23.

The applicant, a Headmaster Grade "A" in the Elementary Education, by his present recourse under Article 146 of the Constitution seeks a declaration that the decision of the respondent Committee to appoint and/or promote the interested parties to the post of Inspector of Elementary Education for general subjects in preference to and instead of himself is null and void. The recourse is based on three grounds :

(1) The respondent Committee failed in its paramount duty to select the best available candidate, contrary to the principle laid down by the then Supreme Constitutional Court in the case *Theodossiou* and *The Republic*, 2 R.S.C.C. 44;

(2) The applicant's superiority vis-a-vis the said appointees as regards efficiency, merit and qualifications was ignored and thus its discretion has been exercised in a defective manner; and, therefore, in abuse or excess of power, or contrary to law; and

(3) The decision complained of is not duly reasoned, in view of the fact that it was a majority decision and there were no reasons given for the stand taken by the dissenting member. In support of this proposition counsel relied on the case of *Athos Georghiades* v. *The Republic* (1967) 3 C.L.R. 653.

The learned Judge of the Supreme Court felt unable to agree with counsel's said submissions; and after reviewing the facts :-

Held, I : *As to the two first aforesaid submissions under (1) and (2) hereabove :*

(1)(a) The post of Inspector General for general subjects has been fixed by the relevant schemes of service as being a first entry post in so far as the three interested parties are concerned, it follows that their selection for this post amounts to an "appointment" and not to a "promotion" as contended by counsel for the applicant.

(b) But this makes no difference at all in the present case, as the paramount duty of selecting the best candidate exists as a matter of general principle of Administrative Law and good administration whether the selection is for appointment or promotion (see *Theodossiou* case, *supra*, at p. 47).

(2) The appropriate organ, therefore, should decide who is the most suitable among the qualified candidates on the totality of the circumstances pertaining to each one of them and should not adopt any ready-made rigid rule divorced from the necessities and circumstances of each particular case. The contention that nothing else should be taken into consideration except the annual confidential reports on the candidates and the recommendations made in this respect by the Inspector concerned, cannot stand, as sub-section (3) of section 35 of the Public Educational Service Law, 1969 (Law 10 of 1969) is not exhaustive of what the appropriate authority has to take into consideration, but is only indicative that due regard has to be given to the aforesaid two factors in addition to the paramount duty to decide on the totality of the circumstances pertaining to each one of the candidates from the circumstances and necessities of each particular case as stated above.

(3) This appears to have been done in the present case where by putting also a uniform set of written questions to the candidates the respondent Committee, as its established practice is, carried out a proper inquiry and acted in the circumstances in compliance with the aforesaid principles of Administrative Law.

(4)(a) Seniority not being in this case a factor in favour of the applicant (as the interested parties have seniority over him), the question is whether the applicant, upon whom the burden lay, had discharged same by establishing that he had *striking superiority* over the interested parties which was disregarded, *mere* superiority not being sufficient to lead to the conclusion that the appointing authorities have acted in excess or abuse of powers (see *Evangelou* v. *The Republic* (1965) 3 C.L.R. 292, at p. 300; *Kousoulides and Others* v. *The Republic* (1967) 3 C.L.R. 438; Decision of the Greek Council of State No. 1406/1954 referred to in *Evangelou's* case, *ubi supra*).

(b) On the material before me, I have come to the conclusion that there has not been established any superiority of a striking nature over the appointees (the interested parties). It is also useful to add that in relation to the selection of appointees in the higher hierarchy, the appropriate organ entrusted with such selection has a wide discretion (see *Frangos* v. *The Republic* (1970) 3 C.L.R. 312, at p. 343, and *Decision of the Greek Council of State No. 2338/1964).*

(5) These two grounds of law (*supra*) cannot, therefore, succeed, as it was reasonably open to the respondent Committee, on the totality of the material before it, to arrive at the *sub judice* decision; and there is nothing to support the view that it acted in excess or abuse of power or contrary to law.

Held, II : *As to the submission that the* sub judice *decision is not duly reasoned, namely, that no reasons are given for the stand taken by the minority :*

(1) The *sub judice* decision is expressed by the view of the majority and not by the view of the minority which, as such, has no executory character and cannot be the subject of a recourse. (*See Conclusions* from the Case Law of the (Greek) Council

of State 1929 - 1959 p. 113 and in particular *Decision* No. 822/1954). The dissenting member, if he had any particular reason, could have asked that his views be recorded in the minutes under the provisions of section 8(4) of the said Law No. 10 of 1969.

(2) On the other hand, the case relied upon by counsel for the applicant (*viz. Athos Georghiades'* Case, *supra*) is not an authority for the proposition that the dissenting views should also be duly reasoned. In my opinion the *sub judice* decision is duly reasoned as it contains all the elements necessary for the ascertainment of its legality. (Cf. *Athos Georghiades'* case, *supra*, at page 666 and the authorities cited therein).

Recourse dismissed.

Cases referred to :

Theodossiou and *The Republic*, 2 R.S.C.C. 44;

Evangelou v. *The Republic* (1965) 3 C.L.R. 292, at p. 300;

Kousoulides and Others v. *The Republic* (1967) 3 C.L.R. 438;

Athos Georghiades v. *The Republic* (1967) 3 C.L.R. 653;

Frangos v. *The Republic* (1970) 3 C.L.R. 312, at p. 343;

Decisions of the Greek Council of State: Nos. 822/1954, 1406/1954, and 2338/1964.

Recourse.

Recourse against the validity of the decision of the respondent Educational Service Committee, whereby they have appointed and/or promoted the interested parties to the post of Inspector of Education for general subjects, in preference and instead of the applicant.

E. Lemonaris for *L. Clerides*, for the applicant.

A. Angelides for *G. Tornaritis*, for the respondent.

I. Typographos, for interested party *D. Stylianou*.

Cur. adv. vult.

The following judgment was delivered by :-

A. LOIZOU, J. : The applicant in the present recourse applies for a declaration that the decision of the respondent to appoint and/or promote the interested parties to Inspectors of Elementary Education for General Subjects, in preference to and instead of the applicant, is null and void and of no effect whatsoever.

The applicant was appointed as an elementary school teacher in 1955. During the years 1961 - 1963 he attended a post-graduate course for school teachers at the University of Athens on paedagogics and other subjects and he obtained a diploma; his marks were 8.1/8th. He was promoted to Headmaster Grade A on the 1st September, 1969. He also participates in a number of out-of-school activities. His marks on the last two confidential reports for the year 1969 - 1970 were 23.30 and for 1970 - 1971, 24.25 out of a total of 25.

Stelios Michaelides (hereinafter to be called "interested party No. 1") was first appointed as an elementary school teacher in 1950 and he was promoted to Headmaster Grade A on the 1st September, 1967. For two years, in 1959 - 1961 he attended at Athens University the same course as the applicant and the marks on his diploma were 9.2/8ths. His marks on the confidential reports of the last two years were for 1969 - 1970, 23.29 and for 1970 - 1971, 24.50.

Andreas Papadouris (hereinafter to be called "interested party No. 2") was first appointed as a school teacher in 1939. In the year 1955 - 1956 he attended a full time course of study in the Department of Education in the University of Edinburgh and passed the examinations in Education. He was promoted to Headmaster Grade A on the 1st September, 1956. His last two confidential reports are for the years 1965 - 1966 and 1970 - 1971, this gap being caused by the assignment to him of other duties during that period. His marks for these two years were 22.12 and 24.15 respectively.

Demetrios Stylianou (hereinafter to be called "interested party No. 3") was appointed as an elementary school teacher as from 1955. He was promoted to a Headmaster, Grade A on 1.9.1969. The marks on his confidential

reports for the years 1969 - 1970 are 23.10 and for the year 1970 - 1971, 24. He attended the same post graduate course for two years at the University of Athens on Paedagogics and other subjects as the applicant and interested party No. 1, and he obtained a diploma with the marks 8.2/8ths.

All interested parties appear to engage also in out-of-school activities.

The post of Inspector of Elementary Education for General Subjects, is a first entry post and the schemes of service are to be found in *Exhibit* 5.

The three posts having been declared vacant by the decision of the respondent Committee on the 29th March, 1971, were advertised in the official Gazette of the Republic of the 9th of April, 1971, Notification No. 867. There were 19 applicants for the posts, and the respondent Committee at its meeting of the 12th May, 1971 (*exhibit* 7A) decided for the purpose of selecting the best suitable candidate for appointment—(a) to hold written examinations on present day developments in the field of Elementary Education and in order to ascertain their ability in one of the prevailing European languages, and (b) to invite them to a personal interview.

The examinations were held at the Paedagogic Academy on the 20th May, 1971, on a uniform set of written questions. They were conducted in a manner ensuring fairness and impartiality, as each candidate was identified by a number and his name was to be found on a card in a sealed envelope. The papers were examined by the members of the respondent Committee, marked separately by each one of them and the average of these marks was recorded on each paper, and countersigned by the Chairman. These examination papers are *exhibits* 8, 9, 10 and 11 and the marks thereon are 30 for the applicant, 34.75 for interested party No. 1, 31 for interested party No. 2 and 35.25 for interested party No. 3. The personal interviews were held on four different dates. As it is stated in the minutes the respondent Committee on the 26th June, 1971 (*exhibit* 6) decided, having in mind the factors pertaining to the candidates, their educational, social, professional and other activities, their performance at the written examinations, the impres-

sion which it got from each one of them by the personal interview, the reports of the Inspectors and the recommendation of the Head of the Department of Elementary Education and on the basis of all factors before it, that the three interested parties satisfied more fully the criteria set out by law and the schemes of service and for that reason they were appointed to the said post.

The decision was taken by majority with Mr. Pavlides dissenting. At the said meeting, present were the Chairman and four members of the Committee.

As finally argued by counsel for the applicant, the recourse is based on three grounds. The first one is that the respondent Committee failed in its paramount duty to select the best available candidate, contrary to the decision of the Supreme Court in the case of *Michael Theodossiou* and *The Republic*, 2 R.S.C.C. page 44.

The second ground which conveniently may be taken with the first, is that the applicant's superiority vis-a-vis the persons appointed as regards efficiency, the merit and qualifications was ignored and thus their discretion was exercised in a defective or wrong manner and therefore they acted contrary to law and the Constitution and in abuse or excess of their powers.

It has been argued by counsel for the applicant that section 35(2) of the Public Educational Service Law, 1969 (No. 10 of 1969) sets out the criteria to be borne in mind by the respondent Committee when effecting promotions, such criteria being merit, qualifications and seniority, and that by virtue of sub-section (3) thereof, in making a promotion, the Committee shall have due regard to the annual confidential reports on the candidates and to the recommendations made in this respect by the Inspector concerned. Although the post of Inspector Elementary Education for general subjects has been fixed in the schemes of service as being a first entry post, in so far as the three interested parties are concerned, their selection for this post amounts to a promotion, as it satisfies the definition of the word "promotion" to be found in section 23 of Law No. 10 of 1969 which reads —

" 'Promotion' means any change in an officer's substantive status which carries with it an increase in the officer's remuneration or which carries with it the emplacement of the officer in a higher division of the Public Service or on a salary scale with a higher maximum, whether the officer's remuneration at the time is increased by such change or not....."

That there is a change in the substantive status of these officers and that it carries an increase in their remuneration within the meaning of the aforesaid definition, there is no doubt. In contradistinction to this, one may look to the definition of the word "appointment" which is a confirment of an office upon a person not in the Public Service or confirment upon an officer of an office other than that which he substantially holds not being a promotion, which means that when there are no changes in an officer's status or in his remuneration, etc., as the word "promotion" requires, the selection for another post in the Service of an already serving officer, is an appointment. The creation of categories of posts under section 25 of the said Law, has as a consequence the different procedure by which the posts of different categories will be filled, as it appears by section 26 of the Law which deals with the methods of filling offices, such as the advertisement of the post of a first entry or a first entry and promotion post, the requirement that each candidate has to submit an application in contradistinction to a case of promotion only, when the promotion is effected without advertisement and by selecting from the officers serving in the immediately lower class, post or grade. The contention, therefore, of counsel for the respondent Committee that section 28 which deals with qualifications for appointment and not section 35, is applicable, does not hold good. In any event, this makes no difference, as the paramount duty of selecting the best candidate exists as a matter of general principle of Administrative Law and good administration and this is obvious from the fact that section 28 has no provision about this duty of selecting the best candidate. As laid down in *Theodossiou case* (*supra*) at page 47 of the report the paramount duty in effecting appointments or promotions is to select the candidate

most suitable in all the circumstances of each particular case for the post in question. In so doing, the appropriate organ should decide who is the most suitable among the qualified candidates on the totality of the circumstances pertaining to each one of them and should not adopt any ready-made rigid rule of thumb divorced from the circumstances and necessities of each particular case. The contention that nothing else should be taken into consideration except the annual confidential reports on the candidates and the recommendations made in this respect by the Inspector concerned, cannot stand, as sub-section (3) is not exhaustive of what the appropriate administrative organ has to take into consideration, but is only indicative that due regard has to be given to the aforesaid two factors, in addition to the paramount duty to decide on the totality of the circumstances pertaining to each one of the candidates, from the circumstances and necessities of each particular case.

This appears to have been done in the present case where by putting also a uniform set of written questions to the applicants, the respondent Committee, as its established practice is, carried out a proper and due inquiry and acted in the circumstances in compliance with the aforesaid principles of Administrative Law.

It should be observed that with the exception of interested party No. 3 who has the same years of service as the applicant, the other two interested parties have seniority over him. The case, therefore, turns on the selection of the candidate most suitable for the post in question and in particular—seniority not being a factor in favour of the applicant—whether the applicant upon whom the burden of proof lay, had discharged same by establishing that he had striking superiority over the interested parties which was disregarded and so the *sub judice* decision should be annulled as having been reached in excess or abuse of power, mere superiority not being sufficient to lead to the conclusion that the appointing authorities have so acted. (Vide *Evangelou* v. *The Republic* (1965) 3 C.L.R. page 292 at p. 300 and Decision of the Greek Council of State, No. 1406/1954 therein referred to. Also, *Andreas Kousoulides & Others* v. *The Republic* (1967) 3 C.L.R. page 438).

On the material before me I have come to the conclusion that there has not been established any superiority of a striking nature. It is useful also to point out that in relation to the selection of appointees in the higher hierarchy in the Service, the administrative organ entrusted with such a selection, has a wide discretion. (Vide *Frangos* v. *The Republic* (1970) 3 C.L.R. 312 at p. 343 and Decision No. 2338/64 of the Greek Council of State). These two grounds of Law cannot, therefore, succeed, as it was reasonably open to the respondent Committee, on the totality of the material before it, to arrive at the *sub judice* decision, and there is nothing to support that it acted in excess or abuse of power or contrary to Law.

The last ground of law relied upon by the applicant, is that the decision is not duly reasoned, in view of the fact that it was a majority decision and there was no reasoning for the stand taken by the dissenting member, Mr. Pavlides. In support of this proposition I have been referred to the case of *Athos Georghiades* v. *The Republic* (1967) 3 C.L.R. page 653. I need not reiterate here the need for due reasoning of decisions of collective organs. This is too well established principle in Administrative Law and there is abundance of pronouncements by this Court. (Vide, *inter alia*, *Athos Georghiades* v. *The Republic* (*supra*) at page 666 of the report and the authorities therein set out).

Athos Georghiades case is not an authority that the dissenting views should also be duly reasoned. What is stated in the said decision with which I am in full agreement, is that there should be such reasoning which is always a question of degree depending upon the nature of the decision concerned, as to be possible to deduce clearly and with certainty the views on this matter of either the majority or the minority of the collective organ, so as to be able to decide whether the organ, through its majority, has acted lawfully and within its powers. In my view, the *sub judice* decision is duly reasoned, as it can be said with impunity that one may decide whether the respondent Committee through its majority has acted, as it has, lawfully and within its powers. The dissenting member, if he had any particular reason, could have asked that his views which were

material to the decision, be recorded in the minutes under the provisions of section 8(4) of Law 10/69, a provision in fact reproducing an Administrative Law principle. The decision, however, is expressed by the view of the majority and not by the view of the minority which, as such, does not have executory character and cannot be the subject of a recourse for annulment. (Vide Conclusions from the Case Law of the Greek Council of State (1929 - 1959), page 113 and in particular Decision No. 822/54). The *sub judice* decision is, therefore, duly reasoned as it contains all the elements necessary for the ascertainment of its legality. This ground, therefore, cannot succeed either.

In the result, the recourse fails and is hereby dismissed; in the circumstances, there will be no order as to costs.

Application dismissed; no order as to costs.