1982 November 12

[L. LOIZOU, HADJIANASTASSIOU, SAVVIDES, LORIS, STYLIANIDES, PIKIS, JJ.]

ANTONIOS KONTEMENIOTIS,

Appellant,

v.

THE CYPRUS BROADCASTING CORPORATION,

Respondents.

(Revisional Jurisdiction Appeal No. 254).

Industrial relations—Collective agreements between Public body and Employees' Trade Union—Lack the force of law and unless adopted as part of the Regulations of a public body they have no application in the domain of public law.

Natural Justice—Rules of—Require that opportunity be given to a party to be heard in penal or disciplinary proceedings—No comparable duty cast on administrative bodies with regard to purely administrative matters—Evaluation report by Head of Department on a candidate—Non-communication of contents of report to candidate—No violation of the rules of natural justice.

Bias—Existence of strained relations between a superior and a subordinate, emanating from their relations at work and stemming from the poor view taken by the superior of the services or conduct of his subordinate can never found bias.

Administrative Law—Administrative acts or decisions—Material misconception of fact relevant to the decision vitiates the inquiry and renders it void—And it makes no difference whether the misconception is revealed by reference to facts crystallizing after the decision.

These proceedings arose out of the decision of the respondent Board not to confirm the appellant to the post of titler-interpreter which he has been holding on probation.

Counsel for the appellant contended that the above decision was invalid because:

(a) In violation of a collective agreement between the respondents and the Employees' Trade Union and in breach of the rules of natural justice the respondents failed to communicate to the appellant the contents of an evaluation report by his Departmental Head.

(b) Of the animosity of the Director of the respondent Corporation towards him amounting to bias.

The above report of the Departmental Head indicated that appellant's services were unsatisfactory and his conduct unbecoming.

Held, (1) that assuming the collective agreement had the force of a rule of law, it would offer no assistance to the appellant for its application is restricted to accusations and the report of the Departmental Head contained none; that, however, the provisions of a collective agreement lack the force of law in that, unless adopted as part of the Regulations of a public body, they have no application in the domain of public law.

(2) That the rules of natural justice require in law that an opportunity be given to a party to be heard in proceedings of a penal or disciplinary character; and that no comparable duty is cast upon administrative bodies with regard to purely administrative matters such as seeking the views of a departmental head on the performance of a candidate, and the answer thereto, matters of a purely administrative character; that in evaluating the services of a subordinate the Board had a right to seek information, with regard to the value of the services of appellant from any legitimate source; that the head of his department was, obviously, the proper channel to apply to for information; that even if a duty was cast on the C.B.C., by virtue of the general principles of administrative law, to communicate adverse confidential reports to a person affected thereby, the non communication of such a report, as the learned trial Judge observed, is not, in itself, a reason for the discharge of the administrative act; that arguably, such failure could only lead to the annulment of the act complained of where it is demonstrated that the inquiry was rendered defective as a result of the non–communication; that here, the facts upon which the report of Mr. Papadopoulos was based derived from the file of the appellant; and that, therefore, the non–communication of the report could not

possibly vitiate the decision on grounds of inadequacy of the inquiry; consequently, the submission of the appellant, that the failure of the respondents to communicate to him the report of Mr. Papadopoulos and afford him an opportunity to reply thereto, cannot be sustained.

(3) That though bias on the part of one or more of those participating in the decision-taking process, renders the inquiry vulnerable on grounds of unfairness there was no evidence establishing that the Director had any interest in the non-appointment of the appellant; that the existence of strained relations between a superior and a subordinate, emanating from their relations at work, stemming from the poor view taken by the superior of the services or conduct of his subordinate, can never found bias; accordingly the complaint of bias is totally ill-founded and must be dismissed.

Held, further, that a material misconception of the facts relevant to a decision, vitiates the inquiry and renders it void; that in principle, it should make no difference whether the misconception is revealed by reference to facts crystallizing after the decision; that, therefore, this Court cannot subscribe to the view of the trial judge, that the mere fact that a disciplinary conviction of the appellant was revoked subsequent to the decision, is irrelevant, as a fact unascertainable at the time of the decision.

Appeal dismissed.

Cases referred to:

Payne v. Lord Harris [1981] 2 All E.R. 842 (C.A.);

Haros v. Republic, 4 R.S.C.C. 39;

Morsis v. Republic, 4 R.S.C.C. 133;

Menelaou v. Republic (1980) 3 C.L.R. 467;

Papacleovoulou v. Republic (1982) 3 C.L.R. 187;

Lewis v. Heffer [1978] 3 All E.R. 354 (C.A.);

R. v. Hull Prison Board of Visitors [1979] 3 All E.R. 545;

HjiGeorghiou v. Republic (1981) 3 C.L.R. 587;

Savva v. Republic (1981) 3 C.L.R. 599;

Republic v. Georghiades (1972) 3 C.L.R. 594;

Gt. Atlantic Insurance v. Home Insurance [1981] 2 All E.R. 485 (C.A.).

Appeal.

Appeal against the judgment* of a Judge of the Supreme Court (A. Loizou, J.) given on the 30th May, 1981 (Revisional Jurisdiction Case No. 102/80) whereby appellant's recourse against the decision of the respondent not to confirm appellant's appointment to the post of Sub–titles and Captions Operator was dismissed.

C. Clerides with *A. Demetriou*, for the appellant.

P. Polyviou with *C. Pamballis*, for the respondent.

Cur. adv. vult.

L. LOIZOU, J.: The judgment of the Court will be delivered by Mr. Justice Pikis.

PIKIS, J.: Antonios Kontemeniotis, the appellant, was employed by the Cyprus Broadcasting Corporation, the C.B.C., in 1969. At first, he served in a temporary capacity but subsequently held the post of titler, in 1978. This post was abolished and replaced by that of titler–interpreter, a post to which there attached a higher salary and apparently better status in the establishment of the C.B.C. On 3rd March, 1978, Kontemeniotis was appointed to the new post on probation for two years. In accordance with the C.B.C. Regulations, enacted under Article 12 of Cap. 300A, notably regulations 8(1) and 8(2), confirmation was dependent on satisfactory discharge of his duties during probation. On 21.3.1980, the Board of the C.B.C. met in the presence of the Director–General to consider his confirmation. They decided not to confirm him because they found him wanting in the discharge of duties and his conduct generally. However, they did not dismiss him, the Director–General was authorised to offer him appointment to the post of titler that was re–established. Kontemeniotis challenged the decision of the respondents and sought its review by the Supreme Court. A number of irregularities in the appraisal of his services and the steps taken for their evaluation, allegedly rendered it invalid. The first complaint is that respondents failed to appraise him of the contents of an evaluation report submitted to the Board by his departmental head, Mr. Papadopoulos, the head of the television department of the C.B.C., purporting to assess his suitability for permanent appointment. This failure ran contrary to a collective agreement between the union of the C.B.C. employees and the C.B.C.,

* Reported in (1981) 3 C.L.R. 195.

providing for communication to employees of reports containing accusations against them. (See Article 8 of the collective agreement). Another ground upon which the decision is attacked is the animosity of the Director towards him, amounting to bias that was wrongly allowed to influence the Board adversely to the appellant, and generally the inadequacy of the inquiry into his suitability for permanent appointment. The response of the respondents was that the inquiry was fair, everything in the file of the appellant, taken into consideration by the Board, was within his knowledge, and that there was nothing to substantiate the charge of bias against the Director-General.

During the hearing of the recourse at first instance, it transpired that a disciplinary conviction for which the appellant had been forgiven by the time of the appraisal of his services by the Board, following a letter of apology by his counsel, was later revoked in proceedings before the Supreme Court for the discharge of his conviction (Recourse No. 392/79). What happened was that applicant was convicted for default in the discharge of his duties and sentenced to a suspension of increments for six months. Thereupon, he filed a recourse for the annulment of the conviction. Subsequently, counsel representing him in the recourse, wrote a letter of apology, purportedly on behalf of his client, that led the Director to lift the sentence and discharge it for all purposes. When the Board attended to the matter of his confirmation, they had the aforementioned picture before them. At a later stage, it became clear that applicant disowned the letter of his advocate, as written without instructions. Ultimately, the conviction was revoked. The learned trial Judge found that this misunderstanding was of no consequence for the decision and left its validity unaffected. Further, he dismissed the remaining grounds put forward by the applicant, as ill-founded. The inquiry conducted into his suitability for a permanent appointment was found to be fair. The non-communication of the letter of the departmental head had no bearing, in the circumstances of this case, on the validity of the inquiry. The non-communication of an adverse confidential report to the reportee, as the learned trial Judge observed, is not in itself a ground for annulment, unless, as one is led to infer from the judgment, the inquiry results in consequence thereof to unfairness. Mr. Clerides invited us to overrule the trial Judge and hold that

the proceedings before the Board were vitiated by breaches of natural justice, as well as the rules embodied in the aforementioned collective agreement. Also, we were asked to find that the inquiry was defective, in that there was a misconception as to material facts, those relating to the conviction of the applicant for a default in the discharge of his duties. And, lastly, that we should set the decision of the Board aside on grounds of bias of the Director-General, evidenced from the strained relationship, in the course of the service, between the Director-General and Kontemeniotis. The respondents submitted that neither omission to communicate to the appellant the report of his departmental head for the purpose of the evaluation of his services, nor any other of the complaints advanced before the trial Judge, rendered the decision of the Board vulnerable to be set aside.

In relation to the omission to bring to his notice the report of the departmental head, the appellant put forward two complaints:-

(a) Violation of the collective agreement, and

(b) breach of the rules of natural justice.

To weigh these complaints, we must examine the report submitted by Mr. Papadopoulos to the C.B.C. on 15.2.1980, at the request of the Board. The report indicates in brief, that his services were unsatisfactory and his conduct unbecoming. Why so? It is explained in the report. The appellant had been convicted and seriously reprimanded by the Director-General for improperly addressing a superior (this was a disciplinary conviction other than the one earlier referred to). This factual statement was correct. It was to the knowledge of Kontemeniotis, it was part of the file of the appellant, and the Board had all the facts necessary for forming its own view on the matter. Assuming the collective agreement had the force of a rule of law, Article 8 would offer no assistance to the appellant for its application is restricted to accusations, and the report of Mr. Papadopoulos contained none. However, in our judgment, the provisions of a collective agreement lack the force of law in that, unless adopted as part of the regulations of a public body, they have no application in the domain of public law. The fact that, allegedly, provisions comparable

to Article 8 of the collective agreement found expression in the Public Service Law—s.45(4) of Law 33/67—and the Public Educational Service Law—s.36(3) of Law 10/69, carries the case of the appellant no further. They derive their force from the law that enacted them. Let alone the fact that the provisions in the aforesaid articles provide for the communication of a specified type of adverse confidential reports, i.e. annual confidential reports, to the person affected thereby and not to the communication of every confidential report about him. If the legislature intended to confer upon employees of the C.B.C. an opportunity to be heard before their non-confirmation to a post in which they served on probation, they would have enacted a provision comparable to s.38(2) of Law 33/67, expressly enjoining the appointing body to communicate to the employee concerned its inclinations.

But the matter does not end there for, we must examine, as invited on behalf of the appellant, whether the non-communication of the aforesaid report amounted to a breach of the rules of natural justice.

The rules of natural justice is that set of rules that should govern the conduct of public bodies charged with the determination of the rights of the citizen. They are founded in the words of Denning, M.R., in *Payne* v. *Lord Harris* [1981] 2 All E.R. 842 (C.A.), on the simple precept of fairness. They require in law that an opportunity be given to a party to be heard in proceedings of a penal or disciplinary character. In Cyprus, the rules of natural justice form part of the fundamental provisions of the Constitution. (See Article 12.5—*Nicolaos D. Haros* v. *The Republic*, 4 *R.S.C.C.* 39; *Stelios K. Morsis* v. *The Republic*, 4 *R.S.C.C.* 133; *Menelaou* v. *Republic* (1980) 3 C.L.R. 467; *Papacleovoulou* v. *Republic* (1982) 3 C.L.R. 187). The right to be heard is safeguarded in proceedings of a penal or disciplinary character. (See, *Lewis* v. *Heffer* [1978] 3 All E.R. 354 (C.A.); *R.* v. *Hull Prison Board of Visitors* [1979] 3 All E.R. 545 (D.C.)).*

A series of Cyprus decisions establish that opportunity to be heard must be given in every case where an accusation of

* *Republic* v. *Lefkos Georghiades* (1972) 3 C.L.R. 594. Relevant principles discussed at length.

a penal or disciplinary character is preferred against the citizen. (See, *HjiGeorghiou* v. *The Republic* (1981) 3 C.L.R. 587; *Savva* v. *The Republic* (1981) 3 C.L.R. 599). No comparable duty is cast upon administrative bodies with regard to purely administrative matters, such as seeking the views of a departmental head on the performance of a candidate, and the answer thereto, matters of a purely administrative character. In evaluating the services of a subordinate, the Board had a right to seek information, with regard to the value of the services of Kontemeniotis, from any legitimate source. And the head of his deparment was, obviously, the proper channel to apply to for information. Even if a duty was cast on the C.B.C., by virtue of the general principles of administrative law, to communicate adverse confidential reports to a person affected thereby, the non-communication of such a report, as the learned trial Judge observed, is not, in itself, a reason for the discharge of the administrative act. Arguably, such failure could only lead to the annulment of the act complained of where it is demonstrated that the inquiry was rendered defective as a result of the non-communication. Here, the facts upon which the report of Mr. Papadopoulos was based derived from the file of the appellant, therefore, the non-communication of the report could not possibly vitiate the decision on grounds of inadequacy of the inquiry. Consequently, the submission of the appellant, that the failure of the respondents to communicate to him the report of Mr. Papadopoulos and afford him an opportunity to reply thereto, cannot be sustained.

Bias: The rules as to bias are, like the rules requiring that an opportunity be given under certain circumstances to a person affected thereby to be heard, part of the rules of natural justice. Only bodies with the imprint of impartiality can carry out a valid inquiry. Bias, on the part of one or more of those participating in the decision-taking process, renders the inquiry vulnerable on grounds of unfairness. Bias may arise in a variety of circumstances, especially from a conflict of interest. We are in agreement with counsel for the appellant that if the charge of bias is established against the Director-General, his presence at the meeting of the C.B.C. and the degree to which his advice was likely to influence their decision, were factors that could colour a decision taken subsequent thereto, with bias. Not

an iota of evidence was adduced to establish that Mr. Christofides had any interest in the non-appointment of Mr. Kontemeniotis. The existence of strained relations between a superior and a subordinate, emanating from their relations at work, stemming from the poor view taken by the superior of the services or conduct of his subordinate, can never found bias. If this were the case, superiors would, in most cases, be excluded from the evaluation of the services of those subordinates of whom they take a poor view. If it was proved that the Director-General had personal animosity on account of any extraneous factor, then, depending on its nature and circumstances giving rise to it, it might conceivably be taken into account in determining whether a case of bias was established. The complaint of bias is totally ill-founded. It is dismissed. Lastly,

Events subsequent to the decision, relevant to the conduct of the appellant: It is settled beyond a shadow of doubt that a material misconception of the facts relevant to a decision, vitiates the inquiry and renders it void. In principle, it should make no difference whether the misconception is revealed by reference to facts crystallizing after the decision. So, we cannot subscribe to the view of the learned trial Judge, that the mere fact that a disciplinary conviction of the appellant was revoked subsequent to the decision, is irrelevant, as a fact unascertainable at the time of the decision. Our view of the law is supported by a decision of the Greek Council of State, deciding that a decision to withhold promotion on account of a disciplinary offence, is liable to be discharged if the conviction is subsequently annulled, naturally because the premises upon which the decision is founded, collapse*. In this case, however, events that came to light subsequently, had no bearing on the decision taken and left the factual substratum, upon which the decision was founded, intact. The Board had before it the decision of the Director-General lifting punishment, and there is nothing to suggest that the Board attached any further significance to the fact. The confusion that arose should be attributed to a misunderstanding between Kontemeniotis and his advocate. We may remind that an advocate is regarded in law as the agent of his client, clothed with the ostensible authority to bind him in all matters related and incidental to the conduct of the case.

* Complement to Case-Law (Greek Council of State) 1953-60-Case 805/53.

(See, *Gt. Atlantic Insurance* v. *Home Insurance* [1981] 2 All E.R. 485 (C.A.)). It is difficult to see how Kontemeniotis could have been confirmed in view of the report of Mr. Papadopoulos and the inadequacy of his services noticed therein. In our judgment, the appeal fails. It is dismissed with no order as to costs.

Appeal dismissed. No order as to costs.