1983 July 5

[HADJIANASTASSIOU, DEMETRIADES, SAVVIDES, LORIS, STYLIANIDES & PIKIS, JJ.]

ANDREAS PAPAKYRIACOU,

Appellant,

v.

1. THE EDUCATIONAL SERVICE COMMITTEE,
2. THE COUNCIL OF MINISTERS,

Respondents.

(*Revisional Jurisdiction Appeal No.* 293).

Educational Officers—School-masters—Posts of—Filling of, by contract—Renewal of contract—Council of Ministers has no power to decide who should be appointed—Its powers are confined to decide the mode of filling—Sections 5(1) *and* 27(1) *of the Public Educational Service Law,* 1969 (*Law* 10/69).

The applicant was a graduate of the Faculty of Mathematics of Athens University. Having applied for appointment as a schoolmaster his name was included in the list of those eligible to be appointed. On September 19, 1979 he was given an appointment on contract to the post of master of mathematics but as he was unable for personal reasons to accept such appointment, it was revoked by the respondent. On divers dates in 1979 the interested parties were appointed on contract for the school year 1979/1980. On the 16th September 1981 the applicant informed the Commission that he was seeking once again appointment as master of mathematics. On the 4th September, 1980, the Council of Ministers decided that there should be renewed all the contracts of schoolmasters who were serving on contract during the school-year 1979/80. As a result the respondent Commission decided to renew, for the school-year 1980/81 the appointment on contract of all those who had been serving on contract during the previous school-year and among them were the interested parties. As no new appointments were made for the school-year 1980/81 the applicant was not appointed and challenged his non-

appointment by means of a recourse. Had it not been for the decision to renew the contracts the place of the applicant on the list of appointees, which was prepared under the relevant regulations, would have secured him an appointment. The trial Judge dismissed the recourse having held that section 27(1)* of Law 10/69 empowered the Council of Ministers to decide to fill posts of school-masters on contract by renewing existing contracts including those of the interested parties; and that there was no need to comply once again with section 5(1) of Law 10/69 and regulation 10 of the Regulations of 1972 when the existing contracts were renewed because such compliance had already taken place when the interested parties were appointed on contract for the previous school-year.

Upon appeal by the applicant:

Held, that the Council of Ministers had no power under s.27(1) Law 10/69 to decide who should be appointed be it by renewal of contract; that their powers were confined to deciding the mode of filling a vacant post by permanent, temporary, or by appointment on contract and not the selection of the candidate for the post thus to be filled; that, therefore, the Council of Ministers in deciding who should be appointed exceeded their powers and their suggestion for filling the post by the renewal of existing contracts ought to be disregarded by the respondents; that far from disregarding them, the respondents approved the recommendation of the Council of Ministers in this respect and appointed officers who have served during the preceding year on a contractual basis; that they acted contrary to the provisions of the law, notably s.5(1), making them in the absence of provision to the contrary the sole judges of who should be appointed. This duty they failed to carry out completely. They failed to exercise any discretion in the matter. They merely rubber stamped the decision of the Council of Ministers; accordingly the appeal must be allowed.

Appeal allowed.

Cases referred to:

Paschalidou v. *Republic* (1969) 3 C.L.R. 297 at p. 300;

Paschali v. *Republic* (1966) 3 C.L.R. 593 at p. 607;

* Section 27(1) is quoted at p. 876 post.

Papakyriakou v. *Republic* (1970) 3 C.L.R. 351 at p. 354;

Ioannou and Another v. *Republic* (1979) 3 C.L.R. 423 at p. 451.

Appeal.

Appeal against the judgment* of the President of the Supreme Court of Cyprus (Triantafyllides, P.) given on the 11th September, 1982 (Revisional Jurisdiction Case No. 453/80) whereby appellant's recourse against the decision of the respondent to appoint the interested parties to the post of master of mathematics in preference and instead of the appellant, was dismissed.

A. S. Angelides with *Ch. Ierides,* for the appellant.

R. Vrahimi (*Mrs.*), for the respondent.

Cur. adv. vult.

HADJIANASTASSIOU J. read the following judgment of the Court. This is an appeal from the judgment of a Judge of the Supreme Court of Cyprus (Triantafyllides, P.) given on the 11th September, 1982 (Revisional Jurisdiction Case No. 453/80) whereby appellant's recourse was dismissed.

In the present appeal the appellant challenges the dismissal of his recourse complaining that the decision of the respondent Educational Service Commission to appoint instead of him the 7 interested parties is null and void and of no effect whatsoever.

The facts are these:

The applicant is a graduate of the Faculty of Mathematics of the University of Athens. On the 2nd January, 1973, he made an application to the appropriate authority regarding the post of a teacher and his name was included in the list of appointees (which are prepared in accordance with the Regulations of the Educationalists Law 1972/1974. The applicant was one of the candidate teachers and was the 16th on the list. The other interested parties which were also included in the said list of candidates of the teachers of mathematics had the following numbers:-

"Hadjipanayis Panayiotis: 98, Ioannides Demetrios: 101; Ioannou Demetrios: 102; Charalambous Koskina Fani: 111; Peyiotou Froso: 107; Hadjiapostolou Despina:

* Reported in (1982) 3 C.L.R. 1151)

116; Georghiadou Ioulia: 118; Tamanis Christos: 182."

On the 17th September, 1979, the committee had appointed the applicants referred to earlier to serve as from 18th September, 1979, till 31st August, 1980. On 25th September, 1979, the committee cancelled the appointment of the applicant and at the same meeting the committee has appointed Hadjipanayi Panayioti, Charalambous Fani, and Hadjiapostolou Despina on contract from 26th September, 1979 - 31st August, 1980. On the 2nd October, 1979, the committee had appointed on contract as from 2nd October, 1979 - 31st August, 1980, Ioannides Demetrios and Ioannou Demetrios. (See the minutes of the Decision).

On 31st August, 1980, Miss Georghiadou Ioulia had been appointed on contract until the 31st August, 1980 having regard to the decision of the Committee dated 12th October, 1979. (see the minutes under letter D).

Mr. Damanis has been appointed by the Decision of the Committee dated 15th October, 1979. (See the minutes 'E'). Miss Beyiotou was appointed by a decision of the Committee on 23rd November, 1979. (The minutes of the committee are attached).

There is no doubt that all the interested parties had served on contract until the end of the school year 1979 - 1980. In addition the Council of Ministers by their decision under No. 19.509 and dated 4th September, 1980, decided "the renewal of the contracts of the said school teachers of secondary education and of general technical education of those who were in service during the school year 1979/80".

In addition the Director-General of the Ministry of Education by a letter dated 8th September, 1980, asked for the renewal of the said contracts. On 10th September, 1980, the Educational Committee took the relevant decision and under that decision the interested parties were appointed on contract for the school year 1980 - 1981. The Committee did not offer a new appointment to a teacher for mathematics for the school year 1981 (except for the renewal of his appointment and all those who were serving during the school year 1979 - 1980), the reason

being that the teachers of mathematics serving covered the needs of the school for that particular specialty.

Indeed, the interested parties who had been serving during the year 1981 are the following: Hadjipanayis Panayiotis; Ioannides Demetrios; Ioannou Demetrios; Charalambous Koskina Fani; Hadjiapostolou Despina; Georghiadou Ioulia.

Furthermore, in accordance with an extract of a meeting of the Council of Ministers dated 4th September, 1980, this decision, under No. 19.509 was taken: "The Council has decided the renewal of all contracts of the teachers Mesis, General and Technical Education serving during the school year 1979/80, but rejected the suggestion of reducing the teaching periods by a week."

On 8th September, 1980, the Director-General Mr. Adamides addressed a letter to the Chairman of the Educational Committee regarding the appointments on contract and had this to say: "After the recent decision of the Council of Ministers dated 4th September, 1980 for the renewal of all the contracts of the teachers - educationalists who have been serving on contract during the past school year 1979/80, please push forward those appointments as from 1st September, 1980 in consultation with the relevant departmental heads."

Before concluding the facts in the present case, I think I ought to add that according to a minute dated 17th October, 1980, it appears that Mr. Papakyriakou was No. 16 on the table of those who have been appointed as mathematicians while the last one who has been appointed under a contract for the school year 1979/80 (and year of appointment has been renewed later on from the last decision of the Council of Ministers) was No. 18. As we know, this year no other mathematician has been appointed, and on the contrary, it appears that there are two redundant school teachers of mathematics.

Then on 27th October, 1980, the Director-General addressed to the Minister of Education a minute and at p. 30 appears this statement: "The applicant is a victim of the decision to renew the contracts of all the school teachers who have served last year. His place 16 would secure him appointment under other conditions. I saw him and explained to him the whole position.

I understand that he will resort to the Courts. (See minute 1 at p. 24 for your information.)"

There is no doubt that if under proper conditions the appointment of the applicant was made by the Committee in the first instance, the applicant no doubt would have been appointed and that was the real meaning of the Director-General, viz., that his place 16 would secure him appointment..

On 11th September, 1982, the learned President of the Court delivered his reserved judgment, and had this to say at p. 42:

"The interested parties were appointed by the said Commission for the school-year 1979/80 on divers dates ranging from 26th September, 1979 to 23rd November, 1979; they were appointed on contract.

On 16th September, 1980 the applicant informed the Commission that he was seeking once again appointment as master of mathematics.

On 4th September, 1980 the Council of Ministers (see its decision No. 19.509) decided that there should be renewed all the contracts of schoolmasters who were serving on contract during the school-year 1979/80. As a result the Director-General of the Ministry of Education, by a letter dated 8th September, 1980, requested the respondent Commission to proceed to renew such contracts as from 1st September 1980. Thus, at its meeting on 10th September 1980 the Commission decided to renew, for the school-year 1980/81, the appointments on contract of all those who had been serving on contract during the previous school-year, and among them were the interested parties.

As no new appointments were made for the school-year 1980/1981 the applicant was not appointed and he filed the present recourse.

Counsel for the applicant submitted that since there is no express provision either in the Educational Service Law, 1969 (Law 10/69) or in the Educational Officers (Teaching Staff) (Appointments, Emplacements, Transfers, Promotions and Related Matters) Regulations, 1972 (see No. 205 in the

Third Supplement to the Official Gazette of 10.11.1972 empowering the Council of Ministers to decide to renew contracts of educationalists, its aforementioned decision of 4th September, 1980, for the renewal of contracts which had actually expired on 31st August 1980, was not validly reached.

Then he addressed his mind to s.27(1) of Law 10/69 which reads as follows:-

"A permanent post is filled either on a permanent basis or on a temporary basis on contract for a specified period or on a month-to-month basis, as the Council of Ministers may decide".

Having quoted that section of the law, he went on to add:

"In my opinion the above legislative provision empowered the Council of Ministers to decide to fill posts of school-masters on contract by renewing existing contracts, including those of the interested parties, and, therefore, the aforesaid submission of counsel for the applicant is not well-founded."

Finally, having quoted also the provisions of s.5(1) of Law 10/69, and regulation 10 of 1972, in dismissing the recourse he had this to say:

"It is not disputed that under section 5(1) of Law 10/69 the Commission is the organ empowered to make appointments of educational officers; and under regulation 10 of the Regulations of 1972 appointments on contract are made in order of priority from among the candidates who are inscribed on the list of those eligible to be appointed; and on the relevant list the serial number of the applicant was 16, and those of the interested parties were 98, 101, 102, 107, 111, 116, 118 and 182."

Grounds of Law:

On appeal counsel for the appellant argued very ably indeed (a) that section 27(1) of Law 10/69 as interpreted by the appeal decision, does not correspond with the whole of the said section and was wrongly considered; and that the Council of Ministers had under that section, power to fill the posts of

the educationalists on contract and with the method of reserving existing contracts. The second submission of counsel was that the appointments by contract of the interested persons, the way they were made, and as they are being attacked contravene s.5(1), as well as s.32 of Law 10/69 and regulation 10(2) of the Regulations of 1972. The third submission is that the contract is one of the methods of filling an empty post. Counsel went even further and argued that once a contract arises out of the law and the act has a particular time limit, it ceases after the expiration of the particular period and the institution of a public servant also ceases to be in existence. Indeed, after the expiration of the time any appointment by a contract creates a new act which could be decided by the appropriate organ in accordance with the law, the regulations and the case law.

Turning now to the point as to what appointment by contract means, there is no doubt that such appointment is the act of the appropriate organ and in the present case is that of the Educational Committee under the provisions of s.5(1) of Law 10/69. Indeed, under an appointment under a contract is the act of the appropriate organ under the law, which in this case, is the committee of educational service, in accordance with s.5(1) of Law 10/69. But I would go further and state that the act of the appointment on contract is an act by which it is created the public service. (See on this point Stassinopoullos (Lessons of Administrative Law), 1957), and at p. 317 the learned author makes it clear that it is an administrative act and the relationship of public servants is created.

In *Antigoni Paschalidou v. The Republic,* (1969) 3 C.L.R. 297, Triantafyllides, J. (as he then was) had this to say at p. 300:-

> "The Appellant's appointment was made under the appropriate legislation which was in force at the time, namely, under section 4(2) of the School-Teachers of Communal Elementary Schools Law, 1963 (Law 7/63 of the Greek Communal Chamber) and it was, on the face of it, made in the ordinary course of satisfying the needs of the educational service, which, by its very nature, is a public service; the Appellant being appointed to serve "in schools of elementary education".

Moreover, as stated in her contract of appointment, the

Appellant's service as a school-teacher would be governed by the relevant Laws and Regulations of the Greek Communal Chamber and by any directives, circulars or other orders of the education authorities.

Viewed in its proper context, the appointment of the Appellant cannot be treated as anything other than a matter within the realm of public Law; the fact that it was made on contract cannot alter its essential nature; this was not a case of a contract entered into between Government and an individual in such circumstances as to render the relationship thus created one of private law.

It follows, therefore, that a recourse under Article 146 did lie in this case."

Indeed, I think I would also add that I have delivered a judgment of my own and had this to say at pp. 303 - 304:-

"The main question which I have really to decide in this appeal is whether the appointment of the Appellant, under the said contract of service, was a matter within the domain of public Law, or as the learned trial Judge found, it was within the provisions of the private Law.

Having given the matter my best consideration, I have reached the conclusion that this contract of service was governed by the provisions of public law for the reasons already advanced by my brother Triantafyllides, J.

With regard to the question of dismissal, after listening to the argument of counsel for the Appellant I am of the view that the services of a school-teacher can be properly terminated under the terms of the contract of appointment, in a proper case, and by the appropriate authority acting under the provisions of section 29(2) of Law 7/63.

Pausing there for a moment it would be observed that under the contract of Appellant's service, the appropriate authority could properly terminate her services by giving a month's notice in writing.

I would, however, state that under section 7 of Law 12/65, the appointment and dismissal of a school-teacher

was entrusted to a Committee of Educational Services. In the absence, therefore, of any evidence that a proper decision by this organ was taken in order to terminate Appellant's services, and that the Director of Education in addressing the letter dated May 31, 1965, was acting under the authority of such organ, I am of the opinion, that the termination of the appointment of the Appellant was wrongly made and was, therefore, null and void and of no effect whatsoever. In my view, counsel for the Respondents quite rightly conceded that no record of any kind was traced to that effect in the files of the Ministry."

In *Iro Paschali v. The Republic,* (1966) 3 C.L.R. 593, Triantafyllides, J., (as he then was) had this to say at p. 607:-

"But the appointment of a public officer is an administrative act, not a mere contractual engagement (see Decision 954/1933 of the Greek Council of State).

It is clear that by an administrative act comes into force what is stated therein and nothing else. So, what was not stated in the terms of appointment of Applicant (exhibit 1) - not even in the relevant decision of the Commission (exhibit 21) - cannot now be of any effect vis a vis Applicant irrespective of what was within the intention of the Commission without becoming part of its relevant act or decision too.

It is, also, wrong to say that Applicant ought to have known that she would be bound by the terms of the advertisement, notwithstanding what is stated in her instrument of appointment, when by the said instrument of appointment the Public Service Commission appears clearly to have decided to appoint applicant on terms other than those advertised.

I am of the view that the terms of appointment of Applicant are those to be found set out in exhibit 1, and no others."

In *Georghia Papakyriakou v. The Republic,* (1970) 3 C.L.R. 351, Triantafyllides, J. (as he then was) had this to say at p. 354:-

"The proper approach to a situation of this nature has been laid down by this Court, on appeal, in *Paschalidou* v. *The*

Republic, (1969) 3 C.L.R. 297; It was held in that case that the employment of a nursery school teacher on contract, on a month to month basis, was within the realm of public law because the appointment had been made 'In the ordinary course of satisfying the needs of .... a public service'. Likewise, the Applicant in the present case had been employed, for a very long and indefinite period of time on a temporary basis, in the ordinary course of satisfying the needs of a public service, viz the maternity service provided by the Nicosia General Hospital.

....In the light of the foregoing I hold that the employment of the Applicant was within the domain of public law and that, therefore, I have jurisdiction under Article 146.1 to decide on the validity of the termination of such employment which is in issue in these proceedings."

In *Ioannou and Another v. Republic*, (1979) 3 C.L.R. 423 at p. 451, I had this to say:-

"Mr. Cacoyiannis in addressing the Court argued that the suspension of the promotions effected by the Minister of Interior is a matter falling within the domain of public law. Because, there is no provision in the Police Law as to the relationship between the administration and the two applicants and what kind of an administrative act or contract was made by the offer of promotion by the Minister of Interior to the posts of Chief Superintendent and Superintendent B' and the acceptance of it by the applicants, I think it is useful to refer to the case of *Pantelidou* v. *Republic*, 4 R.S.C.C. 100, 104 and 105, where the Court held that the termination of the services of the applicant was a matter falling within the domain of public law and not of private law (see *John Stamatiou* v. *The Electricity Authority of Cyprus*, 3 R.S.C.C. 44 at p. 46) and therefore a recourse under Article 146 of the Constitution could be made before the Court against the termination of the services of the applicant. Also in the case of *Paschalides* v. *Republic* (1969) 3 C.L.R. 297 the Court in exercising its revisional jurisdiction held that the contractual appointment of the appellant to a post in the Elementary Education was a matter falling within the domain of public law and there-

fore the Court had jurisdicition to try the recourse in accordance with Article 146 of the Constitution. The fact that the appointment was made on contract could not alter its essential nature. Therefore I am of the view, relying on the aforementioned authorities as well, that such suspension is a matter falling within the realm of public law."

In the final analysis the issues to be resolved are (a) whether the Council of Ministers had authority apart from deciding upon the mode of filling vacant posts, power to decide or recommend who would be appointed; (b) whether the respondents exceeded their powers by disregarding the provisions of regulation 6 setting forth the order in which candidates should be considered. It is clear from perusal of the Minutes of the respondent that they failed to carry out an inquiry of their own into who was elligible for appointment, they simply approved the decision of the Council of Ministers. Presumably they acted on the assumption that they had no duty to inquire into the serial number of the candidates because it was not a case for a first contract appointment but a case for renewal of an existing contract.

We are unable to support the view of the trial Judge that the Council of Ministers had power under s.27(1) of Law 10/69 to decide who should be appointed be it by renewal of contract. Their powers were confined to deciding the mode of filling a vacant post by permanent, temporary, or by appointment on contract and not the selection of the candidate for the post thus to be filled.

This is manifest from the plain provision of s.27(1):

"A permanent post is filled either on a permanent or temporary basis or by contract for a specified period of time or from month to month as the Council of Ministers might decide."

Therefore the Council of Ministers in deciding who should be appointed exceeded their powers. Their suggestion for filling the post by the renewal of existing contracts ought to be disregarded by the respondents. Far from disregarding them, the respondents approved the recommendation of the Council of Ministers in this respect and appointed officers who were serving during the preceding year on a contractual basis. They

acted contrary to the provisions of the law, notably s.5(1), making them in the absence of provision to the contrary the sole judges of who should be appointed. This duty they failed to carry out completely. They failed to exercise any discretion in the matter. They merely rubber stamped the decision of the Council of Ministers.

This being the case, it becomes unnecessary to examine the implications of reg. 6 upon the exercise of their powers. We leave open the question of the priority among candidates and whether a candidate who refuses appointment on contract in one year forfeits his priority vis a vis others who accept appointment with regard to a future appointment.

The appeal is allowed. No order as to costs.

Appeal allowed with no order as to costs.