1984 March 30

[PIKIS, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

SPYROS DROUSIOTIS,

Applicant,

v.

THE CYPRUS BROADCASTING CORPORATION,

Respondents.

(*Case No.* 233/83).

Administrative Law—Misconception of fact—Promotions—Sub judice decision based on finding that applicant lacked the will and skill to carry out the new duties with success—Such finding contradicted by the record of his performance—Respondents acted under a misconception in making their selection—Sub judice decision annulled.

Collective agreement—Though it does not creates rights at public law it may do so where its provisions are made part of the Regulations of an Administrative Authority or part of its practice provided such practice is consonant with the law and compatible with the dictates of sound administration—Practice of the Administration to disregard disciplinary convictions of its officers after the lapse of five years—Not contrary to law and compatible with the norms of sound administration—Effect of failure to implement this practice in the case of the applicant.

Equality—Principle of equality before the administration—Article 28 *of the Constitution—Practice of the administration to disregard previous disciplinary convictions of its officers, in cases of promotions, after the lapse of* 5 *years—Not followed in the case of the applicant—Sub judice decision vitiated on this ground—Further the administration was equally bound to adhere to its proclaimed practice by the principle of good faith.*

Administrative Law—Principle of good faith.

Administrative Law—Discretionary powers—Defective exercise of, through the taking into consideration of an irrelevant matter.

The applicant, a Technical Assistant at the respondent Corporation, challenged the validity of the decision of the respondents to promote the interested parties, in preference to him, to the post of Operator Technical Services, First Grade. In taking the sub judice decision the respondent corporation found that applicant lacked the inclination, skill and dexterity to respond to and carry out successfully the duties envisaged by the above post. Perusal, however, of the record of performance of the applicant at the respondent Corporation, arising from his confidential reports and the remarks made therein, contradicted this finding because for the year 1983 his performance was rated as satisfactory and his capability of operating machinery and equipment was recorded as very satisfactory for the year 1982. The respondent Corporation, also, took into consideration in taking its decision a disciplinary conviction of the applicant which was recorded on the 7.12.77 though clause 8(5) of the Collective Agreement between the Corporation, on the one hand, and the Trade Unions, on the other, provided that disciplinary convictions would be disregarded after the lapse of five years, provided the employee kept a clean record in the meantime. Counsel for the respondents stated that the provisions of the Collective Agreement are adhered to by the Corporation and followed as a matter of practice and that this practice was not followed on this occasion due to an oversight.

Held, that by finding that applicant lacked the will and skill to carry out the new duties with success, though this finding was contradicted by the record of performance of the applicant, respondents acted under a misconception of facts in making their selection which was a misconception of a most material nature because in making appointments or promotions, forecast on past performance of a candidate's ability to perform the duties of the post under consideration, is perhaps the most prominent consideration to which they should pay regard; that this misconception of the respondents leaves no alternative but to annul their decision.

Held, further, that though a collective agreement does not create rights at public law it may do so where the provisions thereof are made part of the Regulations of an administrative authority; that, also, the same result is achieved where such provisions are made part of the practice of an administrative

authority, provided always such practice is consonant with the law and compatible with the dictates of sound administration; that the practice of the administration to disregard disciplinary convictions after the lapse of five years, on condition the officer keeps a clean record in the meantime, is in no way contrary to law and compatible with the norms of sound administration; that the principle of equality before the administration, embodied in Article 28 of the Constitution, binds the administration to treat equally all employees similarly circumstanced and that unless there is good cause, the proclaimed policy of the authority must be adhered to without exception and none existed here; that, further, the administration is equally bound to adhere to its proclaimed practices by the principle of good faith that finds adequate expression in administrative law; that disregard of the respondents' own rule of practice, led, in this case, to a most serious irregularity; that instead of ignoring the disciplinary conviction, they attached considerable importance to it and singled it out in their decision, as a factor militating against the promotion of the applicant; that, consequently, their decision was vitiated by the consideration of an irrelevant matter; and that, therefore, their decision is vulnerable and ought to be set aside for that reason as well.

Sub judice decision annulled.

Cases referred to:

Karageorghis v. Republic (1982) 3 C.L.R. 435;

HadjiSavva v. Republic (1982) 3 C.L.R. 76;

Kontemeniotis v. C.B.C. (1982) 3 C.L.R. 1027.

Recourse.

Recourse against the decision of the respondent to promote the interested parties to the post of Operator Technical Services, First Grade in preference and instead of the applicant.

M. Christodoulou, for *P. Sarris*, for the applicant.

P. Polyviou for the respondents.

Cur. adv. vult.

PIKIS J. read the following judgment. Applicant disputes, by his recourse, the validity of the decision of the respondents taken on 28.3.1983 to promote the interested parties in preference to him, to the post of Operator Technical Services, First Grade. At the hearing, the recourse was withdrawn, with the leave of

the Court, against eight of the ten interested parties, after a statement made by counsel to the effect that their promotion was justified in the light of the facts before the appointing authority. Thus, the list of interested parties was reduced to two, namely, Vladimiros Vladimirou and Michael Chrysanthou. The interested parties, like the applicant, were, before the sub judice decision, holding the post of Technical Assistant at the Cyprus Broadcasting Corporation.

Following the production of the written records illuminating the issues and the background to the case, the issues requiring resolution were identified as follows:–

(a) *Misconception of Facts:* The finding made by the C.B.C. that applicant lacked the inclination, skill and dexterity to respond to and carry out successfully the duties carried by the post under consideration is, in the contention of applicant, ill founded and unsupported by the material before the Board.

(b) *Consideration of Irrelevant Matters:* The contention here is that respondents took into consideration, in making their decision, a fact they had no right to take into account, notably, a disciplinary conviction of the applicant recorded on 7.12.1977. On that occasion, applicant was disciplined for refusal to carry out orders of a superior and was, on that ground, severely reprimanded. Stock was taken of this conviction in breach of the provisions of a collective agreement between the C.B.C. on the one hand and, the Unions of Employees of the Corporation, on the other, providing that disciplinary convictions would be disregarded after the lapse of five years, provided the employee kept a clean record in the meantime (see, Clause 8(5) of the collective agreement). In answer to an enquiry of the Court, counsel for the respondents informed us that the provisions of the collective agreement are adhered to by the C.B.C. and followed as a matter of practice. Counsel expressed regret on behalf of his clients they had not observed their practice on this occasion, a mishap attributed to oversight.

(c) *Striking Superiority:* It is the case for the applicant

that the interested parties were appointed in disregard of his striking superiority over them, emerging from the combined effect of their merits, qualifications and seniority. It is evident applicant was senior, by a long margin, to the interested parties; whereas he held the post of Technical Assistant from 1972, the interested parties were appointed to that position in 1980, that is, Chrysanthou as from 1.6.1980 and Vladimirou as from 1.11.1980. Counsel for the applicant directed attention to the judgment of Hadjianastassiou, J., on the subject of striking superiority and the relevance of seniority in that regard in *Karageorghis* v. *The Republic* (1982) 3 C.L.R. 435. Counsel for the respondents submitted the case of *Karageorghis* is interwoven with the facts of that case and confined thereto. For a definitive statement of the law, on the subject of striking superiority, he referred us to the judgment of *Hadjisavva* v. *The Republic* (1982) 3 C.L.R. 76.

(a) *Misconception of Facts:*

Before the Board of the Cyprus Broadcasting Corporation met to consider the promotions under consideration, they sought the views of a departmental committee on the eligibility and suitability of candidates for promotion. Earlier, the posts were advertised internally and applications were invited from members of the staff of the Corporation for the filling of the post of Operator Technical Services in a new department of the C.B.C. The views of the departmental committee were sought in accordance with the standing practice of the Corporation (exhibit 4). In addition, they obtained the views of the managerial team on the same subject, deemed necessary in view of the fact that a new department of the C.B.C. would be manned (exhibit 5). Whereas the departmental committee recommended the applicant as suitable for promotion, the managerial team did not. Judging from the comments made in relation to his candidature for promotion, it is manifest they attached considerable importance to his disciplinary conviction in excluding him from the list of recommended candidates.

The Director-General of the Corporation was invited to assist the Board in its deliberations. It is clear from the minutes of the decision, the General Manager recommended the interested

parties in preference to the applicant. In the minutes, specific reference is made to the fact that applicant was considered incompetent to carry out the duties of the new post because he lacked the will to adjust to the new duties and the skill necessary to perform them with success. Whether this was a conclusion of the committee or the recommendation of the General Manager, is of no consequence for, it is obvious that if this was the view of the General Manager, it was adopted by the Board as a fact to be reckoned with. Reading the minutes of the Board, the impression I gathered is that this was a finding of the committee, though, as mentioned, whichever view is taken, the result is the same. They acted on the basis that applicant lacked the will and skill to carry out the new duties with success. Perusal of the record of performance of the applicant at the C.B.C., arising from his confidential reports and remarks made therein, contradict the finding of the committee. For the year 1983, his performance was generally rated as satisfactory. His capability of operating machinery and equipment was recorded as very satisfactory for the year 1982. The inescapable inference is that the respondents acted under a misconception of facts in making their selection. It was a misconception of a most material nature; for, in making appointments or promotions, forecast on past performance of a candidate's ability to perform the duties of the post under consideration, is perhaps the most prominent consideration to which they should pay regard. The misconception of the respondents leaves no alternative but to annul their decision. However, this is not the only reason for which the decision must be annulled.

(b) *Consideration of Irrelevant Material:*

Counsel for the respondents submitted that a collective agreement does not, in the light of the decision of the Full Bench of the Supreme Court, in *Kontemeniotis* v. *C.B.C.* (1982) 3 C.L.R. 1027, create rights at public law. Consequently, failure or omission on the part of the respondents to observe, in this case, the provisions of Clause 8(5) of the collective agreement with regard to the erasure of disciplinary offences, can have no effect upon the decision of the respondents. Whereas in *Kontemeniotis* we pointed out that a collective agreement does not, of itself, create rights or liabilities in the domain of public law, we were careful to point out this may be the case where provisions of

the collective agreement are made part of the Regulations of an administrative authority. And by the same logic, it can be confidently predicated, the same result is achieved whenever the provisions of a collective agreement are made part of the practice of an administrative authority. Provided always such practice is consonant with the law and compatible with the dictates of sound administration. The practice of the administration to disregard disciplinary convictions after the lapse of five years, on condition the officer keeps a clean record in the meantime, is in no way contrary to law and, to my comprehension, compatible with the norms of sound administration. After all, an employee must not be haunted for ever by a past fally. Tying an officer for ever to a bad record, provides a disincentive for change to the better—a course that may work detriment, in the longer run, to the interests of the administrative authority. So, I regard the rule of practice adopted by authority as sound. There remains to determine the consequences of failure to implement it in the case of the applicant.

The principle of equality before the administration, embodied in Article 28 of the Constitution, binds the administration to treat equally all employees similarly circumstanced. Unless there is good cause, the proclaimed policy of the authority must be adhered to without exception. And none existed here. As counsel for the respondents informed us, deviation from the rule was due to oversight. Surely, this oversight must not be allowed to prejudice the applicant. It is not only Article 28 that requires an administrative authority, in the interest of equality, to apply their proclaimed policy in a given area, uniformly. The administration is equally bound to adhere to its proclaimed practices by the principle of good faith that finds adequate expression in administrative law. As Prof. Dagtoglou explains, the administration cannot invoke its own omissions in order to disregard a favourable situation for the citizen, or deny the person concerned the benefits of such practice or policy (see, *Administrative Law A'*, 1977, p. 106). Disregard of the respondents' own rule of practice, led, in this case, to a most serious irregularity. Instead of ignoring the disciplinary conviction, they attached considerable importance to it and singled it out in their decision, as a factor militating against the promotion of the applicant. Their managerial team fell into the same error. Consequently, their decision was vitiated by

the consideration of an irrelevant matter. Therefore, their decision is vulnerable and ought to be set aside for that reason as well.

Given my decision, it becomes unnecessary to examine the case of the applicant founded on conditions of striking superiority. In view of the outcome of the case, the respondents will have to go into the matter afresh. In such circumstances, I consider it unnecessary to go into examination of the rival merits of the parties. The decision is annulled. Let there be no order as to costs.

Sub judice decision annulled.
No order as to costs.