1986 May 17

[STYLIANIDES, J.]

IN THE MATTER OF ARTICLE 146
OF THE CONSTITUTION

STYLIANOS KYZAS AND ANOTHER,

Applicants.

v.

1. THE PUBLIC SERVICE COMMISSION,
2. THE REPUBLIC OF CYPRUS, THROUGH THE ATTORNEY-GENERAL,

Respondents.

(Case No. 545/84).

Public Officers—Appointment—First Entry and Promotion Post—Additional qualifications—Cogent reasons should be given for ignoring them—Taking into account the fact that the appointee was a "casual" employee of Government—Such fact completely irrelevant and contrary to law—Scheme of Service—Duties of Public Service Commission in relation thereto—Failure to carry out a due inquiry as to the qualifications of a candidate—Leads to lack of knowledge, amounting to misconception of fact—Striking superiority—In this case and as other material defects of the sub judice decision were brought out, it was not necessary for applicants in order to succeed to prove such superiority.

The applicants challenge by the means of this recourse the appointment of the interested party to the post of Instructor (Civil Engineering) with the Higher Technical Institute, a first entry and promotion post, on the following grounds, namely: (a) The respondent Commission disregarded the additional qualifications of the applicants without giving cogent or any reasons for doing so, (b) The respondent Commission took into consideration irrelevant matters, namely that the interested party was serving as a

"casual" at the Public Works Department (c) The interested party did not satisfy the qualifications required by the scheme of service and/or the respondent failed to make a due inquiry into the matter, and (d) The applicants were strikingly superior to the interested party

On 2 12 85 the respondent Commission revoked the said appointment of the interested party, but the revocation was annulled by a Judge of this Court on the ground that an illegal administrative act, through which a favourable situation has been created for the subject, may be revoked only if there is no lapse of a long interval of time

Counsel for the respondent did not support the validity of the sub judice decision, but counsel for the interested party argued that the reasoning why the applicants' additional qualifications were disregarded can be supplemented from the file and that the applicants failed to prove striking superiority and this was fatal to their case

The relevant scheme of service provided that "(d) Teaching experience in the speciality concerned shall be considered as additional qualification" The qualifications required by the same scheme for the said post were inter alia "(a) Diploma of Higher Technical Institute or other equivalent qualification; (b) Five year's industrial experience and/or practice relevant to the speciality"

The experience which the interested party recorded in his application for the post was as follows Foreman of a private company in London 6/75 - 9/76, Technical Assistant with P.W D in Cyprus 10/78 - 9/79 and 9/80 - 5/82, Civil Engineering with a Cyprus seated company at Saudi Arabia 5/82 - 8/83; and lastly Technical Assistant "B" with Public Works Department from September 1983 His service with a private company in England is not supported by any document The interested party acquired a diploma equivalent to the diploma of Higher Technical Institute in 1980 It should be noted that the advertisement for the post in question prescribed the 5 11.83 as the last day for the submission of the applications of candidates for the post.

Held, annulling the sub judice decision: (1) Both applicants possessed the additional qualification envisaged in the scheme of service. It is well settled that if a candidate possessing the additional qualification is not preferred, then cogent reasons should be given for ignoring the same. Though the applicants' said qualifications were mentioned in the report of the Departmental Committee, it was not singled out as the additional qualification. The respondent Commission simply stated that it took into consideration.... the qualifications of candidates. But such a general reference does not sufficiently disclose whether such material fact was either duly inquired into or taken into consideration. The absence of reasoning why such qualifications were ignored is sufficient by itself ground of annulment.

(2) The decisive factor for selecting the interested party was that he was a "casual" at the Public Works Department. This is a completely irrelevant factor and contrary to law. It constitutes another ground of annulment.

(3) It is the duty of the Commission to construe the scheme of service, then ascertain the qualifications of each candidate as a factual situation and finally to apply the scheme in this factual situation. If the interpretation given to a scheme was reasonably open to the Commission, this Court will not interfere with such interpretation.

In this case the Commission did not interpret the scheme of service. It did not decide whether the practice or experience under paragraph (b) thereof should be acquired or exercised prior to or after the obtaining of the diploma under paragraph (a) of the scheme. If for any reason the period of "Foreman of a private company in London" should not have counted, then the interested party was not eligible for appointment. The Commission simply took for granted that he was eligible for appointment. It failed to carry out a due inquiry as to his qualifications. Such failure caused lack of knowledge which amounts to a misconception of fact.

(4) In the light of the above it was not necessary for applicants to prove striking superiority. Nevertheless, hav-

ing regard to the material before the Court, both applicants are strikingly superior to the interested party.

Sub judice decision annulled.
No order as to costs.

Cases referred to:

Tourpekki v. *The Republic* (1973) 3 C.L.R. 592;

Nissiotis v. *The Republic* (1977) 3 C.L.R. 388;

Skarparis v. *The Republic* (1978) 3 C.L.R. 106;

Petris v. *The Republic* (1981) 3 C.L.R. 57;

Protopapas v. *The Republic* (1981) 3 C.L.R. 456;

Stylianou and Others v. *The Republic* (1984) 3 C.L.R. 776.

Karis v. *The Republic* (1985) 3 C.L.R. 456;

Saruhan v. *The Republic*, 2 R.S.C.C. 133;

Papantoniou and Others v. *The Republic* (1968) 3 C.L.R. 233;

Papapetrou v. *The Republic*, 2 R.S.C.C. 61;

Skapoulis and Another v. *The Republic* (1984) 3 C.L.R. 554;

Antoniades v. *E.A.C.* (1985) 3 C.L.R. 2458;

Petsas v. *The Republic*, 3 R.S.C.C. 60;

Mytides and Another v. *The Republic* (1983) 3 C.L.R. 1096;

Republic v. *Pericleous* (1984) 3 C.L.R. 577;

Ioannides v. *The Republic* (1973) 3 C.L.R. 318;

Mikellidou v. *The Republic* (1981) 3 C.L.R. 461;

Soteriadou and Others v. *The Republic* (1983) 3 C.L.R. 921;

Vourkos and Another v. *The Republic* (1983) 3 C.L.R. 1442.

Recourse.

Recourse against the decision of the respondents to appoint the interested party to the post of Instructor (Civil Engineering) with the Higher Technical Institute in preference and instead of the applicant.

P. Angelides, for the applicant.

R. Gavrielides, Senior Counsel of the Republic, for the respondents.

A. Constantinou for *L. Papaphilippou*, for the interested party.

Cur. adv. vult.

SYLLIANIDES J. read the following judgment. The applicants seek a declaration that the decision of the respondent Commission to appoint Pantelis Yorgallides, the interested party, in preference and instead of them to the post of Instructor (Civil Engineering) with the Higher Technical Institute (H.T.I.) is null and void and of no effect whatsoever.

The post of Instructor (Civil Engineering) being a first entry and promotion one, was advertised in the Official Gazette of 14.10.83 and applications had to be submitted not later than 5.11.83.

A Departmental Board, as provided by s. 36 of the Law, was formed under the chairmanship of the Director of H.T.I. The Departmental Board submitted its report dated 24.1.84 on 30.1.84 (Appendix 7 attached to the opposition). It recommended in alphabetical order four of the candidates, including both applicants and the interested party.

The four candidates were interviewed by the respondent Commission and the Director of H.T.I. on 7.5.84. Questions were put to them on general subjects and mainly subjects relevant to the duties of the post, as set out in the scheme of service. The questions put by the Director

of H.T.I. aimed at testing the capacity of the candidates, both in educational and technical subjects. He made his evaluation of the four candidates to which we shall refer later on in this judgment—(See Appendix 10). The Commission at its meeting of 12.5.84 evaluated the performance of the candidates at the interviews and selected the interested party for appointment to the post in question.

Thereafter a report as to character of the preferred candidate was sought from the Chief of Police. The interested party, according to the said report, was of good character, with no previous convictions and consequently offer of appointment was made to him. The decision of the Commission was finally implemented by appointment of the interested party with effect from 16.8.84.

The applicants impugn the sub judice decision on the following grounds:-

1. The Commission disregarded without giving cogent or any reasons the additional qualification provided in the scheme of service, which the applicants possessed and the interested party did not;

2. The Commission in arriving at its decision took into consideration irrelevant matters;

3. The interested party - appointee - did not satisfy the qualifications required by the scheme of service and/or the Commission failed to make a due inquiry on this matter; and,

4. The applicants were strikingly superior to the interested party.

The respondents opposed this recourse. After the filing of written address by counsel for the applicants, the case was adjourned a number of times on the application of Senior Counsel of the Republic appearing for the respondents, first on the ground that he wanted a certain explanation from the respondent Commission and later that he had given a certain legal opinion on this recourse and expected the Commission to act on it.

The respondent Commission on 2.12.85 revoked the

sub judice decision but the act of revocation was annulled by another Judge of this Court who applied the principle that illegal administrative acts, through which a favourable situation has been created for the subject, may be revoked only if there is no lapse of a long interval of time. Loris, J., reached the conclusion that the time that elapsed from the sub judice decision upto the time of its revocation was more than reasonable and for this sole reason he annulled the act of revocation. Rightly, however, he stated in his judgment:-

> "I must make it clear that I am not carrying out judicial scrutiny in connection with the appointment of the applicant in the aforesaid post. That is an entirely different matter which will be decided in Case No. 545/84 by another Judge of this Court. My task is confined to the revocatory decision of the respondent P.S.C. of 2.12.85".

The interested party entered appearance after the revocatory act and took part in these proceedings by counsel.

Counsel for the respondent Commission did not support the validity of the sub judice decision on the following grounds:-

"1. No sufficient or at all reasoning was given why the Commission disregarded the additional qualification possessed by the applicants and not possessed by the interested party;

2. No sufficient inquiry was made as to the qualifications of the interested party; and

3. There is no reasoning or no concrete reasoning why they took a different view to the one of the Director of H.T.I., the Head of the Department, who evaluated applicant Chrystalla Antoniou as 'Excellent' and the interested party as 'Very Good' and, therefore, this decision cannot survive".

Mr. Constantinou for the interested party admitted that his client did not possess the additional qualification en-

visaged in the scheme of service. Though he conceded that the respondent Commission did not give any reasoning for disregarding the additional qualification of the applicants, he vigorously argued that such reasoning could be found and supplemented from the material placed before the Court as the Commission stated that it took into consideration all relevant factors and the report of the Departmental Board. He admitted that the scale was tipped in favour of the interested party for the sole reason that he was casually employed at the time by the Public Works Department. He submitted that the applicants failed to prove striking superiority and this was fatal for their case.

GROUND No. 1:

The required qualifications set out in the scheme of service (Appendix 5) are:-

(a) Diploma of Higher Technical Institute.... or other equivalent qualifications;

(b) Five years' industrial experience and/or practice relevant to the speciality;

(c) Very Good knowledge of the English language; and,

(d) Teaching experience in the speciality concerned shall be considered as additional qualification.

It is common ground that both applicants have teaching experience in civil engineering. Both have completed an approved course of 300 hours' duration in Technical Teacher and Instructor Training, extending over one year, and a certificate to that effect was awarded to them by H.T.I. Applicant No. 1, Kyzas, has teaching experience with H.T.I. where he is employed as from 1976 as Laboratory Assistant in the Department of Civil Engineering and he is performing also duties of Instructor, and applicant No. 2, Antoniou, teaching experience with the Technical School of Nicosia as Instructor in Building from 18.10.73 - 31.7.74 and from 5.11.74 - 31.7.75—(See relevant certificates).

It is well settled that if a candidate possessing the additional qualification provided in the scheme of service is not preferred, then cogent reasons should be given for ignoring same—(*Tourpekki* v. *Republic*, (1973) 3 C.L.R 592; *Nissiotis* v. *Republic*, (1977) 3 C.L.R. 388; *Skarparis* v. *Republic*, (1978) 3 C.L.R. 106; *Petris* v *Republic*, (1981) 3 C.L.R. 57; *Protopapas* v *Republic*, (1981) 3 C.L.R. 456: *Stylianou and Others* v. *Republic*, (1984) 3 C.L.R. 776; *Karis* v. *Republic*, (1985) 3 C.L.R 456)

In the sub judice decision (Appendix 11) no reference whatsoever is made to the additional qualification of the applicants. The teaching experience of the applicants is only mentioned in the particulars of each of the applicants in the report of the Departmental Board though it is not singled out as the additional qualification The respondent Commission simply stated that it took into consideration the experience and qualifications of the candidates.

A general reference to the qualifications of the candidates does not sufficiently disclose whether such material fact was either duly inquired into or taken into consideration. The Commission was bound to give convincing reasoning why the applicants were not preferred and no reasons whatsoever were given for selecting a candidate who did not possess this additional qualification. This is a material defect sufficient for the annulment of the sub judice decision

GROUND No. 2·

It is clearly stated in the sub judice decision that the interested party was preferred for the sole reason that at the material time he was serving as "casual" at the Public Works Department. This is a completely irrelevant factor, outside and contrary to the Law. This casual employment which should not have been taken into consideration formed the decisive factor in reaching the sub judice decision. The exercise of the discretion of the Commission was influenced by an extraneous irrelevant consideration. Therefore, the exercise of their discretion is plainly defective and the resulting decision has to be annulled—

—(*Salih Shukri Saruhan* v. *Republic*, 2 R.S.C.C. 133; *Papantoniou and Others* v. *Republic*, (1968) 3 C.L.R. 233).

GROUND No. 3:

It was submitted by counsel for the applicants that the interested party did not possess the qualification of experience required by the scheme of service and at any rate no sufficient inquiry was carried out as to his qualifications.

Counsel for the Commission admitted that no sufficient inquiry was carried out as to the qualifications of the interested party. Having regard, however, to the nature of these proceedings—they are not adversary but inquisitorial—the Court has to be satisfied of the defect of an administrative act and a simple admission by the organ who issued the act may not be sufficient for its annulment when the validity of the act is supported by the interested party.

The scheme of service requires "five years' industrial experience and/or practice relevant to the speciality". "Experience" contains the notion of knowledge acquired through acting in a certain capacity—(*Theodhoros G. Papapetrou* v. *Republic*, 2 R.S.C.C. 61, at p. 70; *Skapoullis and Another* v. *Republic*, (1984) 3 C.L.R. 554; *Pantelis Antoniades* v. *The Electricity Authority of Cyprus*, Case No. 283/84, unreported).*

The Commission has a statutory duty to construe the scheme of service, then ascertain the qualifications of each candidate as a factual situation and finally to apply the scheme of service in this factual situation and decide whether a candidate is under the scheme of service eligible for appointment; these duties cannot be either usurped by or left to the Departmental Board and the ultimate competence and responsibility rests on the Commission.

In the present case the Commission does not appear to have interpreted the scheme of service. They did not decide whether this experience or practice should be acquired or exercised prior to or after the obtaining of the

* Reported in (1985) 3 C.L.R. 2458.

diploma or the equivalent qualification provided in paragraph 1 of the scheme of service. Had they done so and their interpretation was reasonably open to them on the basis of the wording of the scheme, this Court would not have interfered even if it might have had a different view— (*Theodhoros G. Papapetrou* v. *Republic*, (supra); *Petsas* v. *Republic*, 3 R.S.C.C. 60; *Mytides and Another* v. *Republic*, (1983) 3 C.L.R. 1096).

Furthermore, the only document in which the qualifications of the interested party appear is his application for appointment. He acquired the H.N.D. in Building from Willesden College of Technology in 1980. This is the equivalent qualification to the diploma of H.T.I. From 1973-75 he attended Tottenham College of Technology for O.N.D.; from 1976-78 he attended Middlesex Polytechnic but as he failed in the second year, he withdrew from the Polytechnic. The experience which he recorded in his application is as follows: Foreman of a private company in London 6/75 - 9/76; Technical Assistant with P.W.D. in Cyprus 10/78 - 9/79 and 9/80 - 5/82; Civil Engineering with a Cyprus seated private company at Saudi Arabia from May, 1982 - August, 1983; and lastly Technical Assistant "B" with Public Works Department from September, 1983.

His service as foreman with a private company in England is not supported by any document. His service and consequential experience with Public Works Department and the Cyprus private company are proved by three certificates (Red 8, 9 and 10). If the period of foreman in London is not counted either because it preceded the acquisition of the H.N.D. or because of its non-existence or because it was not either industrial experience or practice relevant to his speciality (άσκηση σχετική με την ειδικότητά του), then he was not an eligible candidate due to lack of the prescribed qualifications.

In *The Republic* v. *Pericleous*, (1984) 3 C.L.R. 577, it was held that a candidate for a First Entry and First Entry and Promotion post must possess the required qualifica-

tions on the last date of the period prescribed in the advertisement for the vacancy by which applications have to be submitted.

The Commission did not interpret the scheme of service. They failed to carry out any inquiry as to the experience or practice in civil engineering of the interested party. They failed to inquire whether the qualifications of the interested party met the scheme of service. They simply took for granted that he was a qualified candidate for the sole reason that his name was listed in the report of the Departmental Board. Failure to carry out a due inquiry causing lack of knowledge of material facts amounts to misconception of fact—(*Ioannides* v. *Republic*, (1973) 3 C.L.R. 318, at pp. 324-325; *Mikellidou* v. *Republic*, (1981) 3 C.L.R. 461).

A misconception as to facts may consist of either the taking into account of non-existing facts or the non-taking into account of existing facts—(*Skapoullis and Another* v. *Republic*, (supra)).

The Commission had not conducted a sufficient inquiry into a most material aspect of the matter and, therefore, it exercised its discretion in a defective manner. Such decision is wrong in law and was taken in excess and abuse of power.

GROUND No. 4:

It is the duty of the appointing Authority to select the most suitable candidate. The first duty of this Court is to see whether the Authority exercised its discretionary power in conformity with the statutory provisions and the rules and requirements of administrative law generally, including good faith. So long as the Authority acted within those limits, the Court cannot interfere. It cannot substitute its own opinion as to the merits of the candidates for that of the appointing Authority. The administrative Court cannot interfere in order to set aside the decision regarding such

selection unless it is satisfied by an applicant in a recourse before it that he was an eligible candidate who was strikingly superior to the one who was selected because only in such a case the organ which has made the selection for the purpose of appointment or promotion is deemed to have exceeded the outer limits of its discretion and, therefore, to have acted in excess or abuse of its power; also, in such a situation the complained of decision of the organ concerned is to be regarded as either lacking due reasoning or as based on unlawful or erroneous or otherwise invalid reasoning. The onus of establishing striking superiority lies always on the applicant in a recourse—(*Soteriadou and Others* v. *Republic*, (1983) 3 C.L.R. 921; *Vourkos and Another* v. *Republic*, (1983) 3 C.L.R. 1442).

In view of the decision of the Court on Grounds No. 1, 2 and 3 the sub judice decision should be annulled. In such a case it is not necessary for the applicants to prove striking superiority as material defects have been brought out. Nevertheless, having regard to (a) the qualifications of the applicants, (b) the additional qualification, (c) the length of experience—double than the alleged experience of the interested party—(d) the assessment by the Head of the Department—the Director of H.T.I.—and all other factors, both applicants are strikingly superior to the candidate favoured by the sub judice decision.

It is noteworthy that Kyzas, applicant No. 1, in the confidential reports from 1977 - 1983, both years inclusive, was rated "Excellent" by the reporting and countersigning officers of H.T.I. where he was serving as Laboratory Assistant in the Department of Civil Engineering and was also performing duties of Instructor in Civil Engineering.

For all the aforesaid reasons the sub judice decision is invalid. It cannot survive the judicial scrutiny and is hereby declared null and void and of no effect.

In all the circumstances of the case and the practice followed so far no order as to costs is made.

Sub judice decision annulled.
No order as to costs.