

1986 April 3

[SAVVIDES, J.]

IN THE MATTER OF ARTICLE 146
OF THE CONSTITUTION

CHRISTODOULOS CHARALAMBOUS,

Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH
THE PUBLIC SERVICE COMMISSION,

Respondent.

(Case No. 434/83).

Constitutionality of Statutes—The Court does not examine such an issue in abstracto—The Public Service Law 33/67—Section 4(3)—Contention that it is contrary to Articles 124 and 125 of the Constitution—Issue left open.

5 *Public Officers—Promotions—Due inquiry—Confidential re-*
ports—If the Officer who made them is tainted with bias
they must be disregarded, for otherwise their admission
leads to a misconception of fact bearing on the merits of
10 *candidates—The bias should be established to the satis-*
faction of the Court.

Schemes of Service—The appropriate authority may carry out any amendment to a scheme in order to serve the requirements of the service.

15 The applicant challenges the promotion of the interested party I. Yiassoumis to the post of Senior Town Planning Officer instead of him.

20 The following statement appears in the relevant minutes of the respondent Commission: “The Commission noted that in the confidential reports, out of the eight candidates, E. Kalathias and Iason Yiassoumis have the highest gradings and are first and third in order of seniority. Christo-

doulos Charalambous is second in seniority who, however, has the lowest gradings.

The Commission having also taken into consideration the qualifications of all candidates, adopted the recommendation of the Head of the Department for the promotion of Kalathias and Yasoumis". 5

Counsel for the applicant raised by his written address the following grounds of law: (a) That the constitution of the Public Service Commission is unconstitutional, because the power of the President of the Republic under s. 4(3) of Law 33/67 to terminate the appointment of its members is contrary to Articles 124 and 125. (b) That the Commission failed to carry out a due inquiry and failed to evaluate the qualifications of the applicant compared to those of the interested party. (c) That the amendment of the scheme of service was made in excess or abuse of power in that the deletion, effected in 1982, of the required qualification in town planning, was not made in the public interest but for an extraneous purpose, that of favouring the interested party, and (d) That the applicant has been the victim of bias and discriminatory treatment by the Head of the Department. 10 15 20

Held, dismissing the recourse (1) In this case the Court is not invited to decide on the validity of an act taken under the provisions of s. 4(3) of Law 33/67, namely the termination of a term of office of a member of the Commission before its expiration. This Court does not examine in abstracto the constitutionality of a particular provision in a law—in this case s. 4(3) of Law 33/67—but a definite issue arising in the case. The answer to the contention of counsel for the applicant that in view of the provisions of s. 4(3) there is a possibility of a decision of the Commission to be taken under pressure and lack of impartiality is that bias and lack of impartiality are matters which have to be established and the burden of proof lies upon the person alleging same. In this case there is not the slightest doubt that the Commission exercised its discretion in an impartial and unbiased manner. 25 30 35

(2) From the material before the Court it emanates that 40

the respondent Commission before reaching its decision as to who were the best candidates for appointment to the post in question carried out a due inquiry concerning all the necessary criteria on the basis of which it had to make its selection. Further and on the question of qualifications bearing in mind the fact that both parties possessed the qualifications under the scheme of service, and also the views of the Head of the Department as to the experience of the interested party, it was reasonably open to the respondent to treat the interested party as equally qualified for such post.

(3) The allegation that the scheme of service was amended in order to favour the interested party has not been substantiated. It is within the power of an appropriate authority to make schemes of service and carry out any necessary amendments to such scheme in order to serve the requirements of the service.

(4) Any report by a public officer tainted with bias must be disregarded in the interest of Justice. The admission of such report in considering a promotion leads to a misconception of material facts bearing on the merits of the candidates. It is not, however, sufficient that bias, animosity or lack of impartiality should be alleged, but it has to be established to the satisfaction of the Court that the decision taken by an organ was taken under the influence of such factors.

In this case the applicant failed to substantiate his allegations relating to bias.

Recourse dismissed.

No order as to costs.

Cases referred to:

Louca v. The Republic (1983) 3 C.L.R. 783;

President of the Republic v. Louca (1984) 3 C.L.R. 241;

Kazamias v. The Republic (1982) 3 C.L.R. 239;

Josephin v. The Republic (1986) 3 C.L.R. 111;

Soteriadou and Others v. The Republic (1985) 3 C.L.R. 300;

Charalambides v. The Republic (1985) 3 C.L.R. 992;

Christou v. The Republic (1980) 3 C.L.R. 437;

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

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Recourse.

Recourse against the decision of the respondent to promote the interested party to the post of Senior Town Planning Officer, in preference and instead of the applicant.

K. Talarides, for the applicant.

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A. Vladimirov, for the respondent.

Cur. adv. vult.

SAVVIDES J. read the following judgment. The applicant challenges by the present recourse the decision of the respondent published in the official Gazette of the Republic on the 14th October, 1983, by which the interested party, Iason Yiassoumis, was promoted to the post of Senior Town Planning Officer, instead of him.

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The applicant and the interested party were holding, at the material time, the post of Town Planning Officer, Class I, in the Department of Town Planning and Housing. The post of Senior Town Planning Officer is a promotion post, and after the necessary approval of the Minister of Finance for the filling of three vacancies in the said post (two of which in the Town Planning section) was given, a Departmental Committee was set up which recommended eight candidates, amongst whom the applicant and the interested party, for promotion to the two posts in the Town Planning section, with which the present recourse is concerned.

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The respondent Commission considered the report of the Departmental Committee at its meeting of the 8th June, 1983 and postponed the taking of a decision at a later meeting which in fact took place on 25.7.1983, at which the Head of the Town Planning and Housing Department was invited to attend and express his views about the candidates.

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The respondent Commission after having heard the views and recommendations of the Head of the Department and in the light of all the material before it, concerning merits, qualifications and seniority of the candidates, decided to promote Mr. E. Kalathias and Mr. Iason Yiassoum's (the interested party) to the post of Senior Town Planning Officer in the Town Planning section. The recommendations of the Head of the Department about the two said candidates, as recorded in the minutes of the Commission, read as follows:

"In respect of one of the two posts, in the Town Planning section, Efstathios Kalathias is recommended, who is the most suitable for appointment to such post, both regarding merit and qualifications. He has a wide experience in all the town planning sections of the Department and has served at times as District Town Planning Officer in Nicosia, Larnaca and Limassol. He had a leading part in the preparation of town planning schemes and for the last three years he has been put in charge of the preparation of the regulatory plan for which he co-operates with the United Nations. This is a very responsible position and in fact he is the one performing the whole work.

For the second post in the town planning section, there are in fact three candidates who are considered very suitable. They are in the order of priority, Iason Yiassoumis, Othon Yangoulis and Kyriacos Demetriadis. Yiassoumis is the most suitable of all. He has a diploma of the Metsovion Polytechnic. Although he does not possess a diploma in town planning, nevertheless, he is engaged, since his appointment, with town planning matters. He has served as a District Town Planning officer of the Department in Nicosia, Larnaca and Limassol and was also in charge of the preparation of the self-housing scheme which was a very responsible work. He is also responsible for the preparation of the local town planning of Limassol. Though he does not possess a diploma in Town Planning, the experience he has acquired through his work is such that he may be treated as having acquired

'the diploma through practical experience.'

.....

Bearing in mind all the criteria, Yiassoum's is recommended for the second post in the town planning section."

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The decision of the Commission which was taken after the Head of the Department left the meeting, reads as follows:

"In continuation, the Commission dealt with the evaluation and comparison of the candidates in respect of the vacancies in each section separately.

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The Commission examined the material facts from the file for the filling of the post, the personal files and confidential reports of the candidates, and took into consideration the conclusions of the Departmental Committee and the findings and recommendations of the Head of the Town Planning and Housing Department.

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(a) *For the two posts in the Town Planning Section*

The Commission noted that in the confidential reports, out of the eight candidates, E. Kalathias and Jason Yiassoumis have the highest gradings and are first and third in order of seniority. Christodoulos Charalambous is second in seniority who, however, has the lowest gradings.

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The Commission having also taken into consideration the qualifications of all candidates, adopted the recommendation of the Head of the Department for the promotion of Kalathias and Yiassoumis."

The promotions were published in the official Gazette on 14.10.1983, hence the present recourse.

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Counsel for applicant raised by his written address the following grounds of law:

1. That the constitution of the Public Service Commission (the P.S.C.) is unconstitutional.

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2. The P.S.C. did not conduct a due inquiry.

3. The amendment of the scheme of service was made in excess of abuse of power.

4. The applicant has been the victim of bias and discriminatory treatment which led the P.S.C. to act under a misconception of fact.

In arguing his first ground, counsel for applicants contended that the members of the P.S.C. are appointed, in accordance with the provisions of section 4 of Law 33/67, on the condition that their appointment may be terminated at any time by the President of the Republic for reasons of public interest. This is contrary to Articles 124 and 125 of the Constitution which safeguarded the independence of the P.S.C. from interferences by the executive. As long as the members of the P.S.C. serve under such condition, there is always the possibility of pressure being exercised upon them by the executive.

In dealing with the other grounds of law, counsel for applicant contended that the respondent Commission failed to carry out a due inquiry in order to ascertain the real facts of the case and failed to evaluate the qualifications of the applicant compared to those of the interested party. The fact, counsel argued that the applicant had higher qualifications and specialisation in the town planning, than the interested party who did not have specialised qualifications, was not considered by the respondent.

Furthermore, that the amendment of the scheme of service which was effected in 1982 was made in excess and/or in abuse of powers. By such amendment the required qualification in town planning which was a necessary qualification for a Town Planning Officer, was deleted, contrary to the interest of the Public Service and of the Department of Town Planning and Housing. The amendment of the scheme of service, counsel submitted, was not made in the public interest but for an extraneous purpose, that of favouring the interested party.

Lastly, counsel contended that there was discriminatory and unfavourable treatment of the applicant by the Head

of the Department since the latter's appointment in the Department. In support of this contention, applicant gave evidence before the Court on various facts contending that the Head of the Department was biased against him.

In the circumstances of the case, I find it necessary to deal first with the ground of law concerning the constitutionality of section 4(3) of Law 33/67. 5

Article 124.5 of the Constitution reads as follows:

“A member of the Commission shall not be removed from office except on the like grounds and in the like manner as a Judge of the High Court.” 10

The relevant provision of the Public Service Law (Law 33/67) which is alleged to be unconstitutional is section 4(3), and it reads as follows:

«(3) Ὁ Πρόεδρος τῆς Δημοκρατίας δύναται, ἀνεξαρτήτως τῆς διατάξεως τοῦ ἐδαφίου (1) τοῦ ἄρθρου 13, καθ' οἰονδήποτε χρόνον νὰ τερματίσῃ τὸν διορισμὸν τοῦ Προέδρου ἢ οἰουδήποτε ἐτέρου μέλους τῆς Ἐπιτροπῆς, ἐὰν θεωρῇ ὅτι τοῦτο εἶναι πρὸς τὸ δημόσιον συμφέρον: 15 20

Νοεῖται ὅτι πᾶν μέλος τῆς Ἐπιτροπῆς δύναται νὰ υποβάλῃ ὅποτεδήποτε ἰδιογράφως παραιτησὶν ἀνευθυνομένην πρὸς τὸν Πρόεδρον τῆς Δημοκρατίας».

The English translation reads as follows:

“The President of the Republic may notwithstanding the provision of sub-section (1) of section 13, at any time terminate the appointment of the Chairman or any other member of the Commission, if he considers it to be in the public interest: 25

Provided that any member of the Commission may at any time submit his resignation in his own handwriting addressed to the President of the Republic.”) 30

The question of the constitutionality of section 4(3) of Law 33/67 was raised for the first time in the case of *Louca v. The Republic* (1983) 3 C.L.R. 783, where Triantafyllides, P. held the view that although the provisions 35

of section 4(3) of the Public Service Law (Law 33/67) were contrary to Article 124.5 of the Constitution, they were justified by the law of necessity. The relevant passage, at p. 789, reads as follows:

5 "As already stated the vesting, by the said section
4(3), in the President of the Republic of the right to
terminate in the public interest the services of a
member of the Public Service Commission is a leg-
10 islative extension of the powers of the President of
the Republic under the Constitution which can only
be justified by the law of necessity in the same cen-
text in which the setting up by means of Law 33/67
of a new Public Service Commission is found to be
justified by the 'Law of necessity'."

15 An appeal was filed against the above judgment but in
the course of the hearing of the appeal and cross appeal
counsel for the parties made a statement to the effect that
the appellants abandoned or discontinued their appeals
and the cross appeal; and the two respondents in person
20 asked to withdraw their recourses. Such course was fol-
lowed as a result of an overall settlement of the relevant
recourses by means of which the respondents were expected
to withdraw them having been apparently duly compen-
sated. The question, however, arose for consideration by
25 the Full Bench whether an appeal could be withdrawn or
abandoned without the leave of the Court or only with
such leave as a matter of discretion possessed by it under
the relevant rules of Court and on the question whether
a recourse filed under Article 146 of the Constitution
30 could be withdrawn, discontinued or abandoned as of right
by a litigant or whether that could be done only with the
leave of the Court. The majority of the Court (Pikis, J.
dissenting), found that the appeals and cross appeal should
be dismissed and the recourses struck out. In the opinion
35 of some of the members, the additional reason was given
that the recourses have been deprived of their object.
Pikis, J. in his dissenting judgment, refused leave for the
withdrawal of the appeals.

40 The question of constitutionality of section 4(3) was
not considered by the other members of the Full Bench

as the issue before them was not argued and they had only to decide whether the appellants were entitled to withdraw their appeals and the respondent his cross appeal, and the question was left open. Certain obiter views, however, were expressed by some members of the Court on the point in question. Thus, A. Loizou, J. said the following at pages 251, 252 of the judgment (see, the *President of the Republic v. Louca* (1984) 3 C.L.R. 241).

“Before concluding and in view of the importance of the issue of the constitutionality of subsection 3 of section 4 of the Public Service Law 1967, and of the fact that same refers to the powers of the President of the Republic to terminate in the public interest the services of the Chairman or any Member of the Public Service Commission: the whole matter should be reconsidered by the Appropriate Organs of the Republic in the light of the provisions of Article 124, para. 5, of the Constitution which provides ‘a Member of the Commission shall not be removed from office, except on the like grounds and in the like manner as a Judge of the High Court’, and in the light of Article 47, para. (f) and Article 153, paras. 7 and 8 of the Constitution.”

I, myself, said the following at p. 253:

“Due to the importance of the functions of the Public Service Commission and to secure their impartiality and independence from governmental influence, the holding of office by its members was safeguarded for the duration of their term of office by paragraph 5 of Article 124 of the Constitution which provides that:

‘A member of the Commission shall not be removed from office except on the like grounds and in the like manner as a Judge of the High Court’.

In *Kazamias v. The Republic* (1982) 3 C.L.R. 239, at p. 301, in dealing with the object of Article 125.1 of the Constitution, I said:

‘The object of the introduction in our Constitution

of Article 125.1, as already explained, was to entrust the safeguarding of the efficiency and proper functioning of the public service of the Republic, expressly including the exercise of disciplinary control
5 over public officers, to the Public Service Commission, an independent and impartial organ outside the governmental machinery, and, at the same time safeguarding the protection of the legitimate interests of public officers.'

10 The power to appoint a member of the Public Service Commission was vested in the President and Vice-President of the Republic by Article 47(f) of the Constitution. As a result of the intercommunal troubles and the non participation of the Turkish
15 members of the Public Service Commission in such Commission, and the fact that its functioning in the composition provided by Article 124 of the Constitution could not be carried out, the power to appoint the members of the Public Service Commission be-
20 came vested in the President of the Republic under section 4(1) of Law 33/67. By the same Law, the number of its members was reduced to 5 (one Chairman and 4 members) and their term of office, subject to renewal, was fixed at 6 years (which was
25 in line with the period provided by Article 124 of the Constitution). Under section 4(3) of Law 33/67 the President of the Republic may at any time terminate the appointment of the Chairman or of any other members of the Commission if he considers it
30 to be in the public interest."

Since the case had to be decided on another issue, I concluded as follows, at p. 258:

35 "Before concluding I wish to add that I share the view expressed by my learned brother Judge A. Loizou, that in view of the important constitutional issues which have been raised by these recourses and have been argued before us on appeal, and in particular the issue touching the constitutionality of sub-
40 section (3) of section 4 of Law 33/67 in the light of the provisions of Article 124.5 of the Constitu-

tion, the position should be reconsidered by the Appropriate Organs of the Republic so that the independency and impartiality of the Public Service Commission which I stressed in the *Kazamias* case is safeguarded.”

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Stylianides, J., concluded his judgment, at p. 269 as follows:

“In this case questions of legal and constitutional nature were raised. Due to the course that these cases have taken, it is not permissible to pronounce obiter on them. I should not, however, be taken that I agree with the judgment of the first instance Judge on all the points dealt with by him. It is upon the appropriate organs of the State to consider the issues raised.”

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Pikis, J. at p. 277 of his dissenting judgment, expressed an opinion as to the constitutionality of section 3(4) as follows:

“From what I have heard so far and, having anxiously reflected on the matter, I strongly incline to the view that the decision under appeal, importing nullity of the decision to terminate the services of at least one of the two dismissed members of the Commission, is well founded but, for reasons different from those given by the learned trial Judge. The law, in virtue of which the act was taken, namely, sub section 3 of section 4 of the Public Service Law, is, to my mind, unconstitutional. The doctrine of necessity authorises departure from the provisions of the Constitution only to the extent warranted by the necessity. Any action beyond that limit, is unjustified. This emerges clearly from the leading decision on the application of the doctrine of necessity in the *Attorney-General of the Republic v. Mustafa Imbrahim*, 1964 C.L.R. 195 (see, also, the recent decision of the Full Bench of the Supreme Court, in *Aloupas v. National Bank of Greece* (1983) 1 C.L.R. 55). I cannot ignore the repercussions from setting aside a

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5 decision under appeal on the legality of the composition of the Public Service Commission, nor the implications of s. 4 sub-section 3 of Law 33/67 on security of members of the Public Service Commission, most essential for the discharge of their constitutional functions.”

10 The same question was raised once again before this Court in the case of *Josephin v. The Republic Case No. 65/83* in which judgment was delivered on 30.11.1985 and which has not yet been reported*. Triantafyllides. P. in that case, annulled the promotions in question on another point, but making reference to the views expressed in *The President of the Republic v. Louca* (supra) stressed, once again, the need for urgent consideration of the matter
15 by the appropriate organs of the State.

20 What was in issue in the case of *Louca v. The Republic* (supra) was the dismissal of a member of the Public Service Commission on grounds of public interest and should be differentiated from the present case. The opinions expressed in that case by both the President of the Court who heard the case in the first instance and all members of the Full Bench on appeal, referred only to the power of the President of the Republic under section 4(3) of Law 33/67 to dismiss a member of the Public Service
25 Commission. In my obiter opinion in that judgment I observed that the functioning of the P.S.C. in the composition provided by Article 124 could not be carried out as a result of the intercommunal troubles and the non-participation of the Turkish members of the P.S.C. in such
30 Commission and as a result the power to appoint the members which under Article 47(f) of the Constitution was vested in the President and Vice-President of the Republic, became vested to the President of the Republic under section 4(1) of Law 33/67: also, that the term of office
35 provided by Law 33/67 was in line with the period provided by Article 124 of the Constitution. Assuming that sub-section (3) of section 4 is unconstitutional, a question which I am not proposing to decide in this case for the

* Now reported in (1986) 3 C.L.R. 111.

reasons I shall shortly explain, and which I leave open to be decided in a proper case in which the power of the President to dismiss a member prior to the expiration of his term of office will be at stake, the unconstitutionality of a provision in a law which can be severable from the rest, without the object of such law being defeated, cannot render the whole law unconstitutional. 5

In the present case I am not invited to decide the validity of an act or decision taken under the provisions of section 4(3), namely the termination of the term of office of a member of the P.S.C. before its expiration. This Court does not examine in abstracto the constitutionality of a particular provision in a law (in the present case section 4(3)) but a definite issue arising in the case. As very rightly observed by the President of this Court in *Josephin v. The Republic* (supra), questions of constitutional nature are not to be decided unless it is really necessary. 10 15

Counsel for applicant has contended that in view of the provisions of sub-section (3) of section 4, there is a possibility of a decision of the P.S.C. to be taken under pressure and lack of impartiality. Bias and lack of impartiality are matters which have to be established and the burden of proof lies upon the person alleging same. In the present case the applicant has failed to discharge such burden. Irrespective of this, having carefully examined the whole process followed by the respondent Commission, the minutes of the meeting at which the sub-judice decision was taken and the reasons given, in the light of the material contained in the personal files and confidential reports of the parties, I have not the slightest doubt that the respondent acted in an impartial and unbiased way in the exercise of its discretion. 20 25 30

As a result of my above conclusion, this ground of law fails. 35

I am coming next to consider the contention of counsel for applicant on the other grounds of law.

From the material before me the applicant has failed

to establish his allegation that the respondent Commission failed to conduct a due inquiry in order to ascertain the real facts of the case and that it failed to evaluate the qualifications of the applicant and compare them to those
5 of the interested party.

From the material before me it emanates that the respondent Commission before reaching its decision as to who were the best candidates for appointment to the post in question carried out a due inquiry concerning all the necessary criteria on the basis of which it had to make its
10 selection. It took into consideration the merit, qualifications and seniority of the candidates and also the recommendations of the Head of the Department who was invited to attend the meeting for such purpose.

15 In the light of the recommendations of the Head of the Department and the gradings of the applicant and the interested party as appearing in their confidential reports, it rightly came to the conclusion that the interested party was better in merit than the applicant.

20 On the question of qualifications the respondent was satisfied that both parties possessed the qualifications required by the scheme of service. Under the scheme of service no additional qualification of a diploma or degree in town planning was required. Bearing in mind the fact
25 that both parties possessed the qualifications under the scheme of service, and also the views of the Head of the Department as to the experience of the interested party, it was reasonably open to the respondent to treat the interested party as equally qualified for such post. The question of seniority was also taken into consideration and
30 this appears in the minutes of the meeting at which the sub-judice decision was taken to the effect that the applicant was senior to the interested party. Seniority, however, comes into play if parties are equal in respect of all other
35 criteria and in this particular case, on the basis of merit, it was reasonably open to the respondent Commission to reach the conclusion that the interested party was more suitable for appointment than the applicant. In any case, applicant failed to establish striking superiority over the

interested party as to lead this Court interfere with the discretion of the respondent Commission as to the best suitable candidate for appointment.

I come next to consider the allegation of applicant that he was the victim of bias or discriminatory treatment on the part of the Director of the Department.

It is well settled by our case law that any report of a public officer tainted with bias must be disregarded in the interest of justice and that the admission of such report in considering a promotion leads to a misconception of material facts bearing on the merits of the candidates. (*Soteriadiou and others v. The Republic* (1985) 3 C.L.R. 300). Also, persons who participate in a special administrative procedure have to be impartial and unbiased vis-a-vis the candidates and proof of bias or lack of impartiality are matters which may lead to the annulment of any act or decision taken under such procedure. It is not, however, sufficient that bias, animosity or lack of impartiality should be alleged, but it has to be established to the satisfaction of the Court that the decision taken by an organ was taken under the influence of such factors. (*Charalambides v. The Republic* (1985) 3 C.L.R. 992; *Christou v. The Republic* (1980) 3 C.L.R. 437; *Kontemenioris v. C.B.C* (1982) 3 C.L.R. 1027).

The merits of the applicant are reflected in the confidential reports. Such reports at least for the last two years were prepared by another reporting officer than the Director of the Department of Town Planning and Housing and his gradings are only slightly better than those of the previous reports prepared by the Head of Department who is alleged to have acted out of bias.

I have not been satisfied by the evidence of the applicant or by any allegations of his counsel with reference to the material before me that the Director of the Department of Town Planning and Housing was instigated by bias or lack of impartiality against the applicant or any other adverse motives and in the result I reject these contentions of the applicant.

As to the contention of the applicant that an amendment

was effected to the scheme of service in 1982 with the deletion of the requirement for specialised qualifications in town planning and that such amendment was made in excess or abuse of powers in order to favour the interested party, counsel for applicant failed to substantiate his contentions. It is within the power of an appropriate authority to make schemes of service and carry out any necessary amendments to such schemes in order to serve the requirements of the service. In the present case the contention of counsel for applicant that the appropriate authority was instigated by extraneous motives in amending the scheme of service, has not been substantiated.

In the result, this recourse fails and is hereby dismissed, but in the circumstances I make no order for costs.

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Recourse dismissed.
No order as to costs.