

1987 May 9

[MALACHTOS J]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION,
GEORGE PIERIS AND OTHERS,

Applicants,

v

THE REPUBLIC OF CYPRUS, THROUGH
THE PUBLIC SERVICE COMMISSION,

Respondent

(Cases No 184/80, 190/80 & 243/80)

Public Officers — Promotions — Striking seniority — Applicant better in merit, but junior to interested parties — In the circumstances striking seniority was not established

5 *Administrative Law — Misconception of fact — Promotions of Public officers — Commission laboured under the erroneous impression that the interested parties were senior to applicant — Ground of annulment*

10 *Public Officers — Seniority — The Public Service Law 33/67 Section 46 as it stood prior to its amendment by Law 10/83 — In calculating seniority the relevant date is the date of the substantive appointment and not the date of secondment to a post*

By means of these recourses the applicants impugn the decision to promote the interested parties to the post of Administrative Officer, 1st Grade

15 Applicant in Recourse 184/80 complains that the Commission attached undue weight to the seniority of interested party Nissiotis, acted contrary to the recommendations of the Head of the Department by promoting him and that, vis-a-vis, the other interested parties applicants' seniority had to prevail

20 Applicant in Recourse 190/80 argued that the seniority of interested parties Nissiotis and Georghiou ought not to have prevailed as the applicant was better in merit and that as regards the other interested parties the Commission laboured under a misconception of fact, because applicant was considered as junior to them, whilst she was in fact their senior. In respect of the last complaint counsel for the respondent argued that such interested parties were in fact senior to the applicant because they had been seconded to the post of Administrative Officer, 2nd Grade, before the applicant

Finally, applicant in Recourse 243/80 adopted the general grounds put forward by the applicant in Recourse 184/80.

Held, annulling the sub judice decision in part: (A) As regards Recourse 184/80: The applicant failed to establish striking seniority to Nissiotis (Demosthenous v. The Republic (1973) 3 C L R 354 at p 363 adopted). The Commission gave special reasons for not following the recommendations of the Head of the Department; they, also, gave special reasons, for disregarding applicant's seniority over three of the interested parties. Generally the promotion of the interested parties was reasonably open to the Commission. 5

(B) As regards Recourse 190/80: (1) Applicant was better in merit than interested parties Nissiotis and Georghiou, but she is junior to both of them by 3 years and 3 months as regards Nissiotis and 2 years and 9 1/2 months as regards Georghiou. Applicant has more or less equal qualifications to Nissiotis. Georghiou has better qualifications to applicant. In the light of these facts the Court reached the conclusion that applicant failed to establish striking superiority over these two interested parties. 10 15

(2) In accordance with section 46 of Law 33/67 as applicable at the time when the sub judice decision was taken, i.e. before its amendment by Law 10/83, the relevant date, when calculating seniority, is the date of the substantive appointment to a post and not the date of secondment thereto. It follows that as the applicant was in fact senior to the other interested parties, the latter's promotion would be annulled for misconception of fact. 20

(C) Applicant in Recourse 243/80 failed to establish striking superiority over the interested parties.

Sub judice decision annulled in part. No order as to costs. 25

Cases referred to:

Demosthenous v. The Republic (1973) 3 C.L.R. 354;

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

The Republic v. Koufettas (1985) 3 C.L.R. 1950. 30

Recourses.

Recourses against the decision of the respondent to promote the interested parties to the post of Administrative Officer, 1st Grade, in preference and instead of the applicants.

Chr. Triantafyllides, for applicants in Cases Nos. 184/80 and 190/80. 35

P. Pavlou, for applicant in Case No. 243/80.

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

5 *M. Christofides*, for interested parties in Cases Nos. 184/80 and 190/80.

10 *MALACHTOS J.* read the following judgment. In these three recourses, which were heard together as they attack the same administrative decision, the applicants seek a declaration of the Court that the decision of the respondent to promote the interested parties to the post of Administrative Officer, 1st Grade, as from the 15th April, 1980, which was published in the official Gazette on 10th May, 1980, instead of the applicants, is null and void and of no legal effect whatsoever.

15 The factual background to these recourses, so far as relevant, is briefly as follows:

20 The Acting Director-General of the Ministry of Finance, by letters dated 9.2.80 and 1.3.80, requested the respondent Commission for the filling of 7 posts of Administrative Officer, 1st Grade and also two more posts which would be vacated as a result of two promotions to the post of Senior Administrative Officer.

As the said post was a promotion post the respondent Commission dispatched to the Chairman of the Departmental Board a list of the candidates for promotion, their personal files and confidential reports and the relevant scheme of service.

25 The views and recommendation of the Departmental Board were sent to the respondent Commission by which 30 candidates were recommended in alphabetical order, including the applicants and the interested parties.

30 The respondent Commission met on the 28.3.80 and heard the views and recommendations of the Director of the Department of Personnel. It further met on the 3.4.80 and on that date it considered the merit, qualifications and experience of the candidates on the basis of their personal files and confidential reports, the conclusions of the Departmental Board and the
35 recommendations of the Director of the Department of Personnel and decided that the following candidates were on the whole, the best and promoted them as hereinafter stated: 1. Georgiou Odysseas with effect as from 1.8.79, and 2. Anastassiades

Georgios, 3. Georgallides Costas, 4. Georghiou Andreas, 5. Efraxias Spyros, 6. Ioannou Christakis, 7. Lazarou Xenophon, 8. Mantovani Andreas, 9. Nissiotis Omiros, 10. Pantelides Charalambos and 11. Andreas Pateras, with effect as from 15.4.80. 5

As against the above decision the present recourses were filed as follows:

Applicant in Recourse No. 184/80, Georgios Pieris as against interested parties Nos. 3, 4, 5, 6, 9 and 10 but subsequently in the course of the hearing, withdrew his recourse as against interested parties Nos. 5 and 6. 10

Applicant Kika Gava filed Recourse No. 190/80 as against all persons promoted but subsequently withdrew it as against interested parties Nos. 2, 5, 6, 7, 8, and 11 and proceeded only as against interested party Nos. 1, 3, 4, 9 and 10. 15

Applicant in Recourse No. 243/80 Costas Stavrou filed his recourse against the promotions of interested parties Nos. 2,3,4, 6, 7, 8, 10 and 11.

It was argued on behalf of the applicant in Recourse No. 184/80 that the respondent Commission by preferring interested party No. 9, O. Nissiotis, on whose seniority undue importance was given, failed in its primary duty to select the best candidate. Moreover, it acted contrary to the recommendations of the Head of Department by selecting this interested party who was not recommended. And as regards the other three interested parties, it was contended that since they were more or less equal, the applicant's seniority should have prevailed. As regards merit, he is more or less the same as the interested parties, except interested party No. 9 Nissiotis, from whom he is better. 20 25

As regards qualifications, interested parties 3 and 4 are better and he is more or less the same as interested parties Nos. 9 and 10. He is junior to interested party No. 9 Nissiotis, by over 3 years and he is senior to interested parties 3, 4 and 10 by two weeks. 30

In the sub judice decision special reference is made for not adopting the recommendations of the Director of Personnel and for disregarding the applicant's seniority over three of the interested parties, even though I would consider such seniority to be too negligible to be taken into account. 35

As regards interested party Nissiotis, who was senior, I find that the applicant failed to establish that the respondent Commission failed in its duty to select the most suitable candidates for the post in question. See *Demosthenous v. The Republic* (1972) 3 C.L.R. 354 at p. 363 where it is stated that:

«It should be observed that with the exception of interested party No. 3 who has the same years of service as the applicant, the other two interested parties have seniority over him. The case, therefore, turns on the selection of the candidate most suitable for the post in question and in particular - seniority not being a factor in favour of the applicant - whether the applicant upon whom the burden of proof lay, had discharged same by establishing that he had striking superiority over the interested parties which was disregarded and so the sub judge decision should be annulled as having been reached in excess or abuse of power, mere superiority not being sufficient to lead to the conclusion that the appointing authorities have so acted.»

Generally, I would consider that it was reasonably open to the respondent Commission to prefer the interested parties instead of this applicant who has failed to establish any striking superiority over them in order that annulment of the sub judge decision might be justified.

I am, therefore, of the view that this recourse should fail.

On behalf of applicant in Recourse No. 190/80, it was argued that as regards interested parties Nos. 1, O. Georgiou, and 9. O. Nissiotis, undue weight was given to their seniority which ought not to have prevailed since she was better in merit. It was further argued that as regards interested parties Nos. 3, Georgallides, 4. A. Georghiou and 10. Har. Pantelides, she is senior, therefore, the sub judge decision was reached under a misconception of fact since it is stated therein that the interested parties are senior to this applicant.

As regards Georghiou and Nissiotis, she is indeed better in merit, qualifications she has more or less the same as Nissiotis, but Georghiou has better qualifications. Finally, Nissiotis is senior by 3 years and 3 months and Georghiou by 2 years and 9 1/2 months and was also recommended for promotion.

This applicant, in respect of these two interested parties, has

failed to establish any striking superiority and I find that it was reasonably open to promote them instead of her.

As regards, however, interested parties Nos. 3, 4 and 10, as it transpires from a perusal of their personal files, which were before the respondent Commission, they were not in fact senior to the applicant as is stated in the sub judge decision. It is stated therein: «... the Commission took seriously into consideration that the said employee is junior to Mr. Nissiotis and to all employees who were recommended»

The applicant and these three interested parties were all promoted to the permanent post of Administrative Officer, 2nd Grade, on 15.7.71 and to the immediately lower post, that of Administrative Officer, 3rd Grade, as follows: the applicant on 1.2.66 (her seniority to reckon as from 1.5.62), interested party No. 3 on 1.1.67 and Nos. 4 and 10 as from 1.8.66. It is evident, therefore, that even for a few months, she is senior to them and that the sub judge decision was reached under a misconception of fact and must, consequently, be annulled in respect of these three interested parties. Counsel for the respondent in his address claimed that applicant was indeed junior, these interested parties having been seconded to the temporary post of Administrative Officer, 2nd Grade, before her. This may be so, but in accordance with section 46 of the Public Service Law, 1967, Law 33 of 1967, as applicable on the date when the sub judge decision was taken, the relevant date is that of the substantive appointment or promotion, secondment not altering the substantive status of an officer. (See *Tourpeki v. The Republic* (1973) 3 C.L.R. 592 at p. 599 and *The Republic v. Koufettas* (1985) 3 C.L.R. 1950 at p. 1959-61). Subsequent to the sub judge decision, the law was amended by Law 10/83, section 5 and secondment now is taken into consideration when calculating seniority.

This recourse, therefore, should partially succeed as regards interested parties 3, 4 and 10.

Finally, in Recourse No. 243/80 the address made on behalf of applicant in Recourse No. 184/80 was adopted on the general legal points.

Briefly this applicant, though was senior to all interested parties, was, however, inferior in merit and qualifications. He was not recommended by the Director of Personnel Department being

considered by him as inferior to the others as regards merit and that he lacked academic qualifications. In the circumstances, therefore, I find that this applicant is not even superior, let alone strikingly superior over the interested parties and, therefore, his
5 recourse fails.

For the reasons stated above, Recourse Nos. 184/80 and 243/80 fail and are hereby dismissed. Recourse No. 190/80 fails and is dismissed as regards interested parties Nos. 1 and 9 but succeeds as against interested parties 3, 4 and 10, and an Order is made
10 varying the sub judice decision accordingly.

On the question of costs I make no Order.

*Sub judice decision
partly annulled. No order
as to costs.*