

1988 April 5

[MALACHTOS, SAVVIDES, LORIS, PIKIS, KOURRIS, JJ.]

GEORGHIOS MYTIDES,

*Applicant,*

v.

THE REPUBLIC OF CYPRUS, THROUGH  
THE PUBLIC SERVICE COMMISSION,

*Respondent.*

*(Revisional Jurisdiction Appeal No. 706).*

*Annulment of an administrative act or decision—Effect of—Course to be followed by the Administration.*

5 *Collective Organ—Composition of—Withdrawal of some members at some stage of the final deliberations, because of an erroneous view that they were not entitled to participate in the final decision—Rendered composition defective.*

10 The promotion of the interested party to the post of Head, Prices, Control and Consumers' Protection Service, in the Ministry of Commerce and Industry, was annulled by a decision of this Court on the ground of lack of due inquiry relating to the qualifications of the interested party and the interpretation of the scheme of service.

15 During the period, which elapsed between the day, when the annulled decision was taken, and the day, when the Commission met to reconsider the case, the composition of the Commission changed by replacement of two of its members.

20 The Commission, labouring under the wrong impression that the Court had annulled the first decision on the sole ground that no due inquiry was carried out as to whether the degree of Bachelor in Business Administration possessed by the interested party satisfied the scheme of service, conducted an extensive inquiry as to such qualification.

When all relevant material as regards such qualification were collected the Commission met to consider the matter. All its five members were present. They unanimously decided that the interested party possessed the said qualification. Whereupon the two new members of the Commission withdrew from the meeting; the remaining three re-affirmed all other aspects of the annulled decision and, as a result, the interested party was once again promoted to the said post.

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The present appeal is directed against the first instance judgment, whereby the recourse, which had been filed against the said new decision, was annulled.

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Held, *allowing the appeal*: (1) The annulment of an administrative act by this Court sweeps aside not only the act itself, but, also, the reasons founding it. Thereupon the administration comes under a duty to restore the status quo ante and examine the matter afresh by reference to the factual and legal background prevailing prior to the decision.

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The violation of the aforesaid principle in this case suffices to lead to the annulment of the sub judice decision.

(2) In this case the final deliberations began in the presence of all the members of the Commission. At some stage two of them left the meeting on the erroneous view that they were not entitled to participate in the final decision. Such a withdrawal rendered the composition of the Commission defective.

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This is another ground of annulment.

*Appeal allowed. Sub judice decision annulled. No orders as to costs.*

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*Cases referred to:*

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

*The Republic v. Safirides* (1985) 3 C.L.R. 163;

*Kyprianides v. The Republic* (1968) 3 C.L.R. 653;

*Ioannides v. The Republic* (1979) 3 C.L.R. 628;

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*Panayiotou v. The Republic* (1972) 3 C.L.R. 337;

*Kyprianou v. The Republic* (1976) 3 C.L.R. 210;

*Pissas v. The Republic* (1976) 3 C.L.R. 30;

*Vivardi v. The Vines Products Council* (1969) 3 C.L.R. 486;

5 *Decisions 343/1939, 1753/1956, 103/1957 and 1128/1958* of the Greek Council of State.

### Appeal.

10 Appeal against the judgment of a Judge of the Supreme Court of Cyprus (Demetriades, J.) given on the 24th January, 1987 (Revisional Jurisdiction Case No. 47/84)\* whereby appellant's recourse against the promotion of the interested party to the post of Head, Prices Control and Consumers' Protection Service in the Ministry of Commerce and Industry was dismissed.

A. S. Angelides, for the appellant.

15 A. Vladimerou, for the respondents.

G. Triantafyllides, for the interested party.

*Cur. adv. vult.*

MALACHTOS J.: The judgment of the Court will be delivered by Mr. Justice Savvides.

20 SAVVIDES J.: This is an appeal against the first instance judgment of a Judge of this Court whereby the recourse of the appellant directed against the decision of the respondents dated 11th January, 1984, to appoint and/or promote Mr. Costas G. Paschalis, the interested party, to the post of Head, Prices Control and Consumers' Protection Service, in the Ministry of Commerce,  
25 and Industry instead of and in preference to the appellant was dismissed.

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\* (Reported in (1987) 3 C.L.R. 31).

The facts of the case are as follows:

On the 1st April, 1982, the interested party was promoted to the post of Head, Prices Control and Consumers' Protection Service, in the Ministry of Commerce and Industry, by a relevant decision of the respondents and as a result the applicant, together with another candidate, challenged the above decision by Recourses Nos. 226/82 and 290/82. By the judgment in the above recourses, which was delivered on the 19th October, 1983, (see *Mytides and Another v. The Republic* (1983) 3 C.L.R. 1096), the promotion of the interested party was annulled. Due to the fact that the grounds of annulment are material in the present case we find it necessary to deal at some length with the reasons given by the learned trial Judge in the above case for annulling the promotion.

The learned trial Judge proceeded first to consider the first of the numerous grounds raised, that is that the Commission failed to give reasons for disregarding the recommendations of the Head of the Department for promotion and reached the conclusion that there was no merit in respect thereof. He then proceeded to deal with two other grounds that is whether the interested party lacked the qualifications prescribed by the scheme of service and that the decision was faulty because it was taken under a defective inquiry as to the facts of the case and the construction of the scheme of service and concluded as follows: (at pp. 1111 and 1112).

"I find, therefore, that the Commission has not conducted the sufficiently necessary inquiry into a most material aspect of the matter and that, therefore, it exercised its discretion in a defective manner, leading to its decision regarding the promotion of this interested party being wrong in law and in excess and abuse of powers; and, thus it has to be annulled.

It is outside the limits of the jurisdiction of this Court to construe the scheme of service and to state whether the qualification held by the interested party sufficed. The Court should not substitute its own decision for the decision of the Commis-

sion. It was upon the Commission to take such a decision.

5 The applicants complaint that the interested party does not possess qualifications No. 2, 3 and 6. I may say from now that I find no merit in the allegation that it was not open to the Commission to conclude, as it did, on the additional qualification - post-graduate diploma. I need not, however, express any opinion on qualifications No. 2 and 3 so as not to prejudice the respondent Commission in its new inquiry, neither do I consider pertinent to deal with other grounds on which the  
10 validity of the sub judice decision is challenged."

15 After the annulment of the promotion of the interested party the respondent met on the 16th November, 1983, to consider the position in the light of the judgment of the Court. In the meantime during the period that elapsed between 1st April, 1982, when the promotion of the interested party was decided and the 16th November, 1983, when the respondent met, the composition of the respondent had changed by the substitution of two of its previous  
20 members with two new members namely Mr. Papaxenophontos and Mr. Christodoulides. At the meeting of the 16th November, 1983, at which all five members of the Commission were present the respondent according to the minutes of the meeting "noted that the Supreme Court annulled its decision, on the ground that the Commission failed to carry out a due inquiry to ascertain whether candidate Costas Paschali who was then chosen, satisfied the  
25 scheme of service. Therefore, the matter which the Commission has to re-examine at this stage is whether Paschalis satisfied the scheme of service;" and decided to conduct further inquiries into the nature of the academic degree held by the interested party. In this respect, the respondents addressed a letter to the American University of Beirut (which awarded the degree of the interested  
30 party), requesting advice as to whether the degree of business Administration awarded by it is considered as a degree in Commerce. It also addressed a second letter to the Fulbright Commission, inquiring whether the degree of Bachelor of Business Administration, awarded by Universities in the United States, is  
35 treated in the U.S.A. as a degree in Commerce. A third letter was

sent to the British Council inquiring whether the same degree is regarded in the United Kingdom as a degree in Commerce.

By letter dated the 23rd November, 1983, the British Council informed the respondents that although different Universities may offer similar courses under different titles and give different titles to their degrees, the two degrees are similar in the sense that they have the same aims. 5

The Fulbright Commission, by its letters dated the 30th November, 1983, informed the respondents that the degree of Bachelor of Business Administration is, in the U.S.A., used interchangeably as a degree in Commerce and that the courses in Business Administration are related to commercial subjects. 10

The American University of Beirut did not reply to the letter of the respondents.

Parallel to the inquiry carried out by the respondents on this matter, the Director - General of the Ministry of Commerce and Industry, conducted his own inquiries and forwarded to the respondents a telex which he received from the American University of Beirut to the effect that the subjects covered by the degree in Business Administration deal with Commerce and the degree is, therefore, considered to be a degree in Commerce. The same official, also forwarded to the respondents material from the Greek Embassy in Cyprus, showing that the School of Economic and Commercial Sciences in Greece provides courses in (a) Economics and (b) Business Administration and awards degrees in Commerce to its graduates. He, also, forwarded to the respondents an analysis of the subjects followed by the interested party for the purpose of obtaining his degree, pointing out that the Ministry, after careful study of the subjects taught, arrived at the conclusion that the degree in question is directly related to the commercial subjects and that the degree can be considered as an equivalent degree in Commerce (see letter dated the 22nd November, 1983, appendix 9 to the Opposition). 15 20 25 30

On the 26th November, 1983, counsel for the applicant wrote to the respondents on this matter and forwarded to them a letter dated the 22nd November, 1983, from the University of Oxford, the material part of which reads:

5            "This University does award degrees in Economics but not in Commerce or Business Administration; and would consider the three subjects to be *entirely separate*, although interrelated."

10            At their meeting of the 10th December, 1983, the respondents decided to seek the advice of the Office of the Attorney-General on certain matters. On the 7th January, 1984, the respondents wrote to the Attorney-General's Office and asked for advice, *inter alia*, as to whether the degree of the interested party can be considered as a title in Commerce.

15            On the 22nd December, 1983, the Director-General of the Ministry forwarded to the respondents another letter which he received from the American University of Beirut, confirming that the degree awarded to the interested party could be considered as a degree in Commerce.

20            The Office of the Attorney-General, by its letters dated the 10th January, 1984 and 11th January, 1984, advised the respondents that from the material before it, it is deduced that the degree on the interested party could be legally considered as a title in Commerce (Appendices 19 and 20).

25            In the light of the above material respondent met on 11th January, 1984, to take a final decision. At such meeting all five members of the respondent Commission were present. After examination of the new material before them they concluded that the degree held by the interested party could be considered as one in  
30            Commerce and thus satisfying the relevant provision of the scheme of service. Then the proceedings, as recorded in the minutes, went on as follows:

"At this point Messrs. Papaxenophontos and Christodou-  
 lides who were not members of the Commission which held  
 the interviews and made the general evaluation of the candi-  
 dates, stated that they were not going to participate in the ex-  
 amination of the question of the selection of the best candidates  
 for the filling of the post and with the unanimous agreement of  
 the Commission they left the meeting. The Commission (the  
 Chairman and the two other members) after re-examining all  
 the material before them were satisfied that Paschalis pos-  
 sessed at the material time the other qualifications also which  
 were required by the scheme of service including experience  
 and good knowledge of the economy of the island (paragraphs  
 (2) and (3) of the required qualifications under the scheme of  
 service).

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The Commission having taken into consideration:

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(a) That the previous decision by which Costas Paschalis  
 was promoted as from 1st April, 1982 to the post of the Head,  
 Prices Control and Consumer's Protection Service, in the Min-  
 istry of Commerce and Industry had been annulled by the Su-  
 preme Court *for the sole* reason that no due inquiry had been  
 carried out then, as to whether the degree of Bachelor in Busi-  
 ness Administration held by the candidate satisfied paragraph  
 (1) of the Scheme of Service;

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(b) after a mediculous inquiry and study of the material col-  
 lected by the Commission it was found that Paschalis pos-  
 sessed at the material time the qualifications referred to in para-  
 graph (1) of the Scheme of Service;

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(c) that at the material time Paschalis held the other qualifi-  
 cations; and

(d) that at the meeting of the Commission dated 22.3.82 after  
 examination of all material facts from the personal files and  
 confidential reports of the candidates and having taken into  
 consideration the reports of the departmental committee and the

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performance of the candidates at the interviews before the Commission as well as the fact that the additional qualification provided by the Scheme of Service was possessed by Paschalis, Charalambides and Hadjiconstantinou, Paschalis had been  
5 found, on the basis of the established criteria on their totality (merit, qualifications, seniority) as suitable and that he was superior to the other candidates, decided today, that in the light of the legal advice of the Attorney-General of the Republic under No. 226/82 and 290/82 dated 24.10.83 to promote Costas  
10 Paschali to the permanent post of Head, Prices Control and Consumer's Protection Service, retrospectively as from 1st April, 1982 i.e. as from the date of his previous promotion to the post in accordance with the decision of the Commission dated 22nd March, 1982."

15 A perusal of the minutes of the meetings of the respondent and all other material which was taken into consideration by the respondent in accordance with its inquiry two questions pose for consideration in the present appeal which had to be determined first before we proceed to deal with all other grounds of law  
20 raised.

(a) Whether the proceedings of the respondent Commission which led to the sub judice decision were properly conducted and

(b) Whether the change in the composition of the respondent after the deliberations had commenced and before the final decision was taken is such as to nullify their decision.  
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We shall proceed to examine the first question.

It is clear from the material before us that the respondent commission misinterpreted completely the decision of the Court in re-  
30 course No. 226/82 by which their previous decision for the promotion of the interested party was annulled by the Court. It is apparent from the minutes of the meetings of the respondents when re-examining the case that they were operating under the misconception that their previous decision was annulled "on the

sole ground that no due inquiry was carried out as to whether the degree of Bachelor in Business Administration possessed by the interested party satisfied the scheme of service." This is clearly stated in the minutes of both the meeting of 16th November, 1983, when they started their deliberations and the meeting of 11th January, 1984, when the sub judice decision was taken. The respondents instead of proceeding to examine the promotion with reference to the factual and legal background prevailing at the time when their previous decision was taken, examined and decided in full quorum the question as to whether the interested party possessed the necessary qualifications under the scheme and then, in a composition of three members only, they simply re-affirmed their decision without going afresh into the merits, qualifications and seniority of the candidates in order to reach their decision after a new inquiry.

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It is well settled that with the annulment of the first decision not only the decision itself but the reasons founding it were swept aside: "Where a decision is declared wholly invalid under Article 146.4(b) the decision as well as the premises upon which it is based disappear. Thereupon the administration comes under a duty to restore the status quo ante and examine the matter afresh by reference to the factual and legal background prevailing prior to the decision." (Per Pikis, J. in the decision of the Full Bench in *The Republic v. Safirides* (1985) 3 C.L.R. 163, at p. 170, adopting in this respect *Pantelakis Kyprianides v. The Republic* (1968) 3 C.L.R. 653; *Ioannides and Another v. The Republic* (1979) 3 C.L.R. 628).

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This defect in the proceedings by itself is sufficient to nullify the sub judice decision.

We come next to consider whether a collective organ such as the respondent could validly take the sub judice decision though its composition had changed after the deliberations had started and part of the decision had been taken by all five members and the final decision by only three of the members.

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5 The relevant principles of administrative law are well settled by a series of cases of this Court (*Panayiotou v. The Republic* (1972) 3 C.L.R. 337, at pp. 339 - 340; *Vivardi v. The Vines Products Council* (1969) 3 C.L.R., 486, at pp. 489-491; *Kyprianou v. The Republic* (1976) 3 C.L.R., 210, at pp. 212-213; *Pissas v. The Republic* (1976) 3 C.L.R., 30, at pp. 34-35). In all the said cases the relevant principles as stated in the Conclusions from the Jurisprudence of the Greek Council of State 1929-1959 at p. 112 are adopted. They are to the following effect:

10 "The process before any collective organ, regarding discussing about, and deciding on, any matter, has to take place from beginning to end while there are present the same members of such an organ as to ensure the knowledge and evaluation by each member of all factors which come to light during  
15 such process. If this process extends to more than one meeting then the composition of the collective organ must remain unchanged in all its relevant meetings. If there is any change in the composition of the collective organ, at any meeting, through the presence of a member who did not take part at a  
20 past meeting on the matter, the organ cannot take a valid decision at its last relevant meeting, except if at such meeting the whole process is repeated fully ab initio, so that the consideration of the matter can be regarded as having commenced and been concluded at such last meeting."

25 Relevant in the matter are the decisions of the Greek Council of State 343/1939, 1753/1956, 103/1957, 1128/1958.

In *Kyprianou v. The Republic* (*supra*) A. Loizou, J. after expounding on the above principles concluded as follows at p. 213:

30 "On the other hand, if a member or members are excluded on an erroneous view that they could not participate at such a meeting, the collective organ in question cannot be considered as properly composed when an administrative decision is taken even if there is quorum and, therefore, such decision should be annulled on the ground of wrong composition of the organ."

In *Vivardi v. The Vine Products Council* (supra) Triantafylides, J. (as he then was) in drawing the distinction between the case where a member who was present at the first meeting was absent at the second meeting and the case of the presence at a later stage of a previously absent member, where the deliberations had commenced and continued in several meetings, concluded as follows at p. 490:

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"I can quite well see why in a case where there has supervened a change in the composition of a collective organ, through the presence, at a later stage, of a previously absent member, it is necessary for the whole process to be repeated all over again so that all members, in reaching a decision, should be cognizant of all relevant factors; and, also, where a member of a collective organ has not been able to take part in all the relevant to a matter meetings he should not be allowed to participate when the decision is being reached on such matter.

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But in a case, such as the present one, in which a member drops out after the first meeting, I can see no useful purpose being served by expecting the remaining members, before reaching a decision, to start ab initio, at their second meeting, the whole process which had commenced at the first meeting, at which all of them were all along present."

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The present case however is distinguishable from *Vivardi* case (supra) as in the present case the final deliberations commenced in the presence of all five members of the Commission who participated in the taking of a unanimous decision as to the qualifications of the interested party and who in the course of the same-meeting acting on an erroneous view that they could not participate in the final deliberations excluded themselves from participating in the final decision taken in the course of such meeting and left the meeting. We agree with the opinion expressed by A. Loizou, J. in *Kyprianou* case that as a result of the erroneous view which led the two members to exclude themselves and not participate in the final decision, the respondent Commission, act-

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ing as a collective organ could not be considered as properly composed when the sub judge decision was taken:

5 For the above reasons the appeal succeeds and the sub judge decision of the respondents has to be and is hereby annulled. In view of our above conclusion we do not consider it pertinent to deal with the other grounds raised in this appeal.

In the result the appeal is allowed with no order for costs.

*Appeal allowed.  
No order as to costs.*