

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

PANTELIS KYPRIANOU AND OTHERS (NO. 1),
Applicants,

and

THE REPUBLIC OF CYPRUS, THROUGH
THE PUBLIC SERVICE COMMISSION,

Respondent.

PANTELIS
KYPRIANOU
AND OTHERS
(No. 1)
v.
REPUBLIC
(PUBLIC SERVICE
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(Cases Nos. 362/72 & 366/72).

Legitimate Interest—Existing legitimate interes —Article 146.2 of the Constitution—Public officer—Challenging validity of promotion to post of Accounting Officer 1st Grade—At time of said promotion not holding post of Accounting Officer 2nd Grade as required by the relevant scheme of service but he had been holding such post at an earlier date—On the facts of this case he still has an existing legitimate interest to attack decision complained of.

Constitutional Law—Article 146.2 of the Constitution— Existing legitimate interest.

10 The only issue for consideration in these proceedings was whether applicant No. 2 possessed a legitimate interest, in the sense of Article 146.2 of the Constitution, to file a recourse against the promotion of the interested party to the post of Accounting Officer, 1st Grade in the Treasury Department. This issue was
15 raised in the form of a preliminary point of law by Counsel for the respondent on the ground that at the time of the *sub judice* decision, on July 19, 1972, this applicant was not holding the immediately lower post of Accounting Officer, 2nd Grade, as required by the relevant scheme of service of the post of
20 Accounting Officer 1st Grade.

The said applicant was holding the post of Accounting Officer 2nd Grade until December, 1971 but on the 1st January, 1972 he was promoted to the post of programmer in the same Department. The *sub judice* appointment was made with retrospective effect from August, 1971. The post of Accounting Officer 2nd Grade is on scale 13 and that of 1st Grade on scale 16. The
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post of Programmer, on the other hand, is on scale 15 and is thus a lower post than the *sub judice* post to which the interested party was promoted retrospectively.

Held, (after dealing with the Law governing legitimate interest at pp. 164–166 of the judgment post).

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In spite of the fact that on the date of the hearing of this case this applicant was promoted he retained his existing legitimate interest and was certainly entitled to attack the said promotion once it was made by the Commission retrospectively. That he has a legitimate interest to-day appears also from the fact that he has been promoted to a different and inferior post than the one to which the interested party was promoted.

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Order accordingly.

Cases referred to:

Kallouris v. The Republic, 1964 C.L.R. 313 at pp. 324 and 325;

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Neophytou v. The Republic, 1964 C.L.R. 397;

Chrysostomides v. The Greek Communal Chamber, 1964 C.L.R. 280;

Christofis v. The Republic (1970) 3 C.L.R. 97;

Decisions of the Greek Council of State: Nos. 551/52, 1591/52, 1016/54, 3713/28, 1433/56.

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Recourses.

Recourses against the decision of the respondent Public Service Commission to promote the interested party to the post of Accounting Officer, 1st Grade, in preference and instead of the applicants.

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K. Talarides, for applicant in Case No. 362/72.

E. Lemonaris, for applicant in Case No. 366/72.

A. Evangelou, Counsel of the Republic, for the respondent.

Cur. adv. vult.

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The facts sufficiently appear in the ruling which was delivered by:

HADJIANASTASSIOU, J.: In these two recourses, which have been heard together, the respondents in their opposition raised a preliminary point of law regarding the second applicant, Vasos Polycarpou, that he does not qualify under Article 146.2 of the Constitution, to file the present recourse, because at the time when the decision of the Commission complained of was taken, on July 19, 1972, he did not hold the post of Accounting Officer, 2nd Grade, as required by the relevant scheme of service of the post of Accounting Officer, 1st Grade, having accepted and being appointed to the post of Programmer w.e.f. 1st January, 1972.

The facts are these:—

The second applicant joined the Government service on July 1, 1955, as a Clerical Assistant (Temporary), and on January 1, 1956, he became a Clerical Assistant. After serving for a number of years, he was promoted to Clerk 2nd Grade on November 1, 1964, and on January 2, 1965, he became an Accounting Officer 2nd Grade, a post which he was holding until December 31, 1971. Then, on January 1, 1972, he became a Programmer, a post which is under the Treasury Department of the Ministry of Finance.

The interested party, Joseph A. Mousa, joined the public service as a store-keeper on November 1, 1957, and on January 2, 1965, he became an Accounting Officer, 3rd Grade. On December 1, 1965, he was promoted to Accounting Officer, 2nd Grade, and on August 1, 1971, he was promoted to the post of Accounting Officer 1st Grade, (see the table showing particulars of the Government service of the parties).

In the meantime, the second applicant, together with the rest of the applicants in these two recourses, in 1971 attacked the promotion of the interested party, and the Supreme Court*, having heard those recourses, that is, 304/71 and 336/71, declared the promotion of the interested party as being *null* and *void* because the same required quorum of the Commission did not exist at the time of the promotion. In order to follow the proceedings, I think it is necessary to refer first to the minutes of the Commission of May, 1971, which show that the Commission, in filling the vacancies in the post of Accounting Officer, 1st Grade, in the Treasury Department after promoting

* Vide (1972) 3 C.L.R. 337.

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two of the then candidates, decided to place the interested party J. Mousa, on the waiting list.

In fact, on July 27, 1971, the Commission met in the presence of the Accountant-General, Mr. Nathanail, who said that he continued to believe that Mr. Mousa was the best officer, and decided to promote him to the permanent post of Accounting Officer, 1st Grade w.e.f. 1.8.71. This promotion of July 27, 1971, as I said earlier, was annulled, and on July 19, 1972, the Commission once again promoted the interested party to the permanent post of Accounting Officer, 1st Grade, with retrospective effect from August 1, 1971, apparently having in mind the observations of the Supreme Court in *Georghios Michael Kallouris v. The Republic of Cyprus through the Public Service Commission (An Independent Body)*, 1964 C.L.R. 313 at pp. 324 and 325 regarding the powers of the Commission to promote retrospectively public officers when the previous promotion was annulled due to reasons of formalities, that is to say, *inter alia*, because of defective composition of the appointing organ. See Conclusions from the Jurisprudence of the Greek Council of State (1929-59), at pp. 197, 198; also Decisions 551/52; 1591/52 and 1016/54, on the question of promoting retrospectively a public officer.

All the applicants, feeling aggrieved once again, filed the present recourses on September 12 and 15, 1972 respectively, complaining that the decision of the Commission was *null* and *void* and of no effect whatsoever.

The respondent filed the opposition on October 7, 1972, and as I said earlier, they alleged that the second applicant had no legitimate interest to attack the promotion of the interested party. It is true that in order to enable an applicant to file a recourse before the Supreme Court, he must show that he brings his case within paragraph 2 of Article 146 of the Constitution, that he has an existing legitimate interest. I quote the said paragraph:-

“ Such a recourse may be made by a person whose any existing legitimate interest, which he has either as a person or by virtue of being a member of a Community is adversely and directly affected by such decision or act or omission”.

It appears that this paragraph has been modelled on the lines of s. 48 of the Greek Law, No. 3713/28, and, therefore, the

principles formulated by the Greek Council of State are indeed very helpful in interpreting our own Constitutional provision

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In Decision No. 1433/56, the Greek Council of State had this to say:—

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5 “Ἐπειδὴ τὸ κατὰ τὸ ἄρθρον 48 τοῦ ν. 3713 ἔννομον συμφέρον, τὸ ἀπαιτούμενον πρὸς ἀσκησιν αἰτήσεως ἀκυρώσεως, δέον σὺν τοῖς ἄλλοις νὰ εἶναι καὶ ἐνεστῶς. Ἐν τῇ ἐννοίᾳ δὲ τοῦ ἐνεστῶτος, προκειμένου περὶ προσβολῆς διοικητικῆς πράξεως, οἷα ἡ προσβαλλομένη, δι’ ἧς ἐνεκρίθη ἡ ἐπὶ τῆς γραμμῆς
10 Ὁμοιοίας—Πειραιῶς κυκλοφορία τῶν τεσσάρων λεωφορείων τῆς παρεμβαιούσης περιλαμβάνεται, κατὰ τὴν ἐννοίαν τοῦ νόμου, καὶ ἡ προϋπόθεσις, ὅπως τὸ ἔννομον συμφέρον πηγάζῃ ἐξ εἰδικῆς τινὸς σχέσεως τοῦ διοικουμένου πρὸς τὴν προσβαλλομένην ὑπ’ αὐτοῦ ἀτομικὴν διοικητικὴν πράξιν, ὑφισταμένης κατὰ τε τὸν χρόνον τῆς ἐκδόσεως τῆς πράξεως
15 ταύτης καὶ κατὰ τὸν χρόνον τῆς προσβολῆς αὐτῆς”.

And in English it reads:—

“ In accordance with s. 48 of Law 3713, legitimate interest, required for the institution of a recourse for annulment,
20 should *inter alia*, also be an existing one. Within the meaning of existing, regarding the attack of an administrative act, as in the present case by which the circulation on the route Omonia—Piraeus of the four buses of the intervening company was approved is included, according
25 to the meaning of the law and on the assumption that the existing interest emanates from a special relationship of the person governed with the individual administrative act attacked by him, existing both at the time the act is issued and at the time the act is attacked”.

30 See also the Conclusions from the Jurisprudence of the Greek Council of State 1929–1959 at p. 257 et seq., and the Recourse for Annulment before the Council of State 3rd ed. by Tsatsos at p. 30 paragraph 13 et seq. I propose quoting also this passage under the heading “Legitimate Interest”:

35 “ Αἱ διέπουσαι τὴν δραστηριότητα τῆς διοικήσεως ἐπιταγαὶ τοῦ δικαίου εἶναι δημοσίας τάξεως. Ἐν τούτοις ἡ αἴτησις ἀκυρώσεως διοικητικῆς πράξεως ἢ ὀφειλομένης ὑπὸ τῆς διοικήσεως ἐνεργείας, δύναται ν’ ἀσκηθῇ μόνον ὑπὸ φυσικοῦ ἢ νομικοῦ προσώπου κεκτημένου ἴδιον συμφέρον ἐκ τῆς ἀκυρώσεως καὶ δὴ συμφέρον ἔννομον, ἄμεσον, ἐνεστῶς καὶ συγκεκρίμενον”.

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And in English it reads:-

“ The principles of administrative justice relating to the activities of the administration are of a public nature. Nevertheless, the recourse for annulment of an administrative act or an omission to act by the administration may only be instituted by a natural or legal entity having a vested personal interest in the annulment and particularly legitimate, direct, existing and concrete interest”.

The sole question, therefore, to be decided in this preliminary point of law, is whether the applicant has an existing legitimate interest to attack the promotion of the interested party. Counsel on behalf of the respondent contended that the second applicant is disqualified once at the time the *sub judicè* decision was taken on July 19, 1972, he was no longer serving in the immediately lower post of Accounting Officer, 2nd Grade. He relies on *Chrysostomides v. The Greek Communal Chamber*, 1964 C.L.R. 397; *Neophytou v. The Republic*, 1964 C.L.R. 280; and *Elias Christofis v. The Republic of Cyprus* (1970) 3 C.L.R. 97. He also relied on the provisions of s. 30 (1)(c) of the Public Service Law 1967 (No. 33 of 1967) which provides that “promotion offices shall be filled by the promotion of officers serving in the immediately lower grade or office of the particular section or sub-section of the public service, as the case may be”.

In *Chrysostomides* case, the Court took the view that the requisite interest of the applicant must subsist at the date of the hearing of the recourse as well. In *Christofis* case, although the applicant had a legitimate interest in filing the recourse, during the hearing he was dismissed from the service and the Court had this to say at p. 462:-

“ Having given the matter my best consideration, and in the light of the authorities to which I have referred, I have reached the view that because the applicant has been dismissed from his post on or about the 12th June, 1969, for misconduct, he has no longer an existing legitimate interest today and, therefore, cannot complain that another person was emplaced in that post”.

As it appears, an administrative act must be such an act from which a direct legal effect is derived. To be amenable to judicial review, it must be shown that the administrative act which is challenged, adversely and directly affects any existing

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legitimate interest of the applicant. There is no doubt that the Courts have refused to accept any kind of *actio popularis* that can be brought by an individual whose legal rights have not been directly affected. The word "adversely" which appears in paragraph 2 of Article 146, denotes that such interest of an applicant should be affected to his detriment. Whether the interest, of course, of an applicant is directly affected, is a question of fact to be determined on the particular facts of each case.

10 It is not necessary for an applicant to establish affirmatively that he has the necessary legitimate interest entitling him to make a recourse, but once the existence of his legitimate interest has been challenged, such proof should be adduced.

15 Counsel on behalf of the second applicant invited the Court to take the view that the cases relied upon by counsel on behalf of the respondent are distinguishable, and that his client, once he could have been promoted in July, 1971, he has an existing legitimate interest to attack the recourse, particularly in view of the facts of his case.

20 There is no doubt that the post of Accounting Officer 2nd Grade is on scale 13 and that of 1st Grade is on scale 16. The post of Programmer is on scale 15, and is a lower post than the one to which the interested party Mousa was promoted retrospectively.

25 Having considered the able contentions of both counsel, I have reached the conclusion that, in spite of the fact that on the date of the hearing of this case the second applicant was promoted he retained his existing legitimate interest and was certainly entitled to attack the said promotion once it was made by the Commission retrospectively. That he has a legitimate interest today appears also from the fact that the second applicant has been promoted to a different and inferior post than the one to which the interested party was promoted.

35 I think I ought to reiterate that my decision is based on the facts of the present case only, and I agree that the cases quoted before me are distinguishable on the facts.

40 For the reasons I have endeavoured to explain, I would, therefore, dismiss the contention of counsel for the respondent, as I take the view that the second applicant still has an existing legitimate interest to attack the decision complained of. In

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view of the fact that this appears to be a novel point, I am not proposing to make an order for costs.

Order accordingly.

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