

1987 July 29

[SAVIDES, J.]

**IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION**

**DEMETRIS PAPAMICHAEL,**

*Applicant,*

v.

**THE REPUBLIC OF CYPRUS, THROUGH  
THE PUBLIC SERVICE COMMISSION,**

*Respondent.*

*(Case No. 807/85).*

5 *Public Officers — Promotions — Confidential reports — Circular 491/79 — Changes altering the overall assessment effected without prior discussion between countersigning and reporting officer — For the reasons explained in Republic v. Argyrides (1987) 3 C.L.R. 1092, the sub judice promotions have to be annulled.*

*Public officers — Promotions — Qualifications — Scheme of service requiring five years «service» in particular post — In the circumstances it was reasonably open to the Commission to interpret the term «service» as including «service on secondment» to such post.*

10 *Public Officers — Promotions — Seniority — Governed by section 46 of the Public Service Law, as amended by section 5 of Law 10/83 — Manner of holding a post does not matter, but what matters is the exact date of appointment to a post — It is only when such date is the same that the provisions of subsection (2) of section 46 come into play.*

15 By means of this recourse the applicant challenges the promotion of the two interested parties *Rayias* and *Nicolaou* to the post of Commerce and Industry Assistant, 1st Grade.

20 The applicant was appointed to the post of Industrial Assistant, being his first entry post, on 16.7.79, whereas the two interested parties, being already permanent officers, were seconded to the temporary post of Commercial Assistant 2nd Grade, to which they were promoted on 15.3.82.

25 The scheme of service for the post in question provided as a requirement for promotion «at least five years' service in the post of Commerce and Industry Assistant, 2nd Grade/Commercial Assistant, 2nd Grade/Industrial Assistant».

The respondent Commission, having accepted the recommendations of the Head of the Department stated that especially with regard to *Rayias* the Commission noted that during the last two years Papamichael had better Confidential Reports than *Rayias* who, however, had superior report in the previous year. On the basis, however, of the three established criteria as a whole and placing the proper weight to the seniority of *Rayias* being 15 whole years, it preferred the latter» 5

In the confidential report for Nicolaou for 1982 there is one change effected by the countersigning officer in red changing his overall assessment from very good to excellent 10

In the confidential reports for *Rayias* for the years 1981 and 1982 there are 7 and 6 corrections respectively, made by the countersigning officer and changing in his favour the overall picture

It is common ground that the aforesaid changes were effected without prior discussion of the matter, as provided by Circular 491/79, between the countersigning and the reporting officer 15

The applicant supported his case by raising the following grounds of law

(1) The interested parties did not possess the required qualification of «five years service in the post of Commercial Assistant, 2nd Grade»

(2) The aforesaid confidential reports are invalid as the prescribed by Circular 491/79 procedure was not followed, and 20

(3) The applicant is superior to the interested parties in merit, qualifications and seniority

Held, *annulling the sub judice decision* (1) The outcome of the issue relating to the matter of the qualifications depends on whether the service of the interested parties during the period of their secondment to the post of Commercial Assistant, 2nd Grade, can be regarded as «service» within the meaning of the term in the scheme of service. The term «service» appearing in schemes of service in similar circumstances was considered in *Republic v Psaras* (1985) 3 C L R 1939 where it was held that it included secondment to a temporary post in circumstances such as those of the present case» 25 30

In the light of *Psaras* case and bearing in mind that in this case the posts of Industrial Assistant 2nd Grade (to which the applicant was appointed, being his first entry post) and the posts of Commercial Assistant 2nd Grade (to which the interested parties, being permanent officers, were seconded) were temporary posts, it was reasonably open to the respondent to interpret the scheme in the way it did 35

(2) The aforesaid confidential reports were prepared in contravention of the

regulations and have changed the overall picture of the candidates. It follows that for the reasons explained in *Republic v. Argyrides* (1987) 3 C.L.R. 1092, the sub judice promotions have to be annulled on this ground.

5

(3) Seniority is governed by section 46\* of Law 33/67, as amended by section 5 of Law 10/83. The manner of holding a post is immaterial for the purposes of seniority. It is the exact date of appointment to the post that counts and it is only when such date is the same, that sub-section 2 of section 46 comes into play for calculating seniority on the basis of the officers' appointments to their previous posts.

10

As in this case the appointment of applicant to the post of Industrial Assistant 2nd Grade was not made on the same date as the secondment of the interested parties to the post of Commercial Assistant, section 46(2) could not come into play and Rayias is senior to the applicant by only 3 1/2 months. It follows that the Commission as far as Rayias is concerned laboured under a misconception of fact.

15

*Sub judice decision annulled.  
Costs in favour of applicant.*

*Cases referred to:*

20

*Partellides v. Republic* (1969) 3 C.L.R. 291;

*Republic v. Koufettas* (1985) 3 C.L.R. 1950;

*The Republic v. Psaras* (1985) 3 C.L.R. 1939;

*Stylianou v. Republic* (1986) 3 C.L.R. 579;

*Christofides v. Republic* (1985) 3 C.L.R. 1127;

*Themistocleous v. Republic* (1985) 3 C.L.R. 2652;

25

*Lofitis and Another v. Republic* (1986) 3 C.L.R. 1318;

*Arghyrides v. Republic* (1986) 3 C.L.R. 1488;

*Karpasitis v. Republic* (1986) 3 C.L.R. 1617.

*Republic v. Argyrides* (1987) 3 C.L.R. 1092.

**Recourse.**

30

Recourse against the decision of the respondent to promote the interested parties to the post of Commerce and Industry Assistant, 1st Grade in preference and instead of the applicant.

A.S. Angelides, for the applicant.

\* Quoted at p. 1121.

*A. Papisavvas, Senior Counsel of the Republic, for the respondent.*

*Cur. adv. vult.*

SAVVIDES J. read the following judgment. The applicant challenges the decision of the respondent published in the official Gazette of the Republic dated 26.7.85, whereby the interested parties, namely, A. Rayias and P. Nicolaou were promoted to the post of Commerce and Industry Assistant, 1st Grade as from 1.7.1985. 5

The applicant was holding, prior to the sub judice decision, the post of Industrial Assistant and the interested parties that of Commercial Assistant 2nd Grade, both of which are the immediately lower posts to the post of Commerce and Industry Assistant 1st Grade, which is a promotion post. 10

The Ministry of Commerce and Industry requested, by letter dated 5.12.1984, the filling, amongst others, of two vacant posts of Commerce and Industry Assistant 1st Grade, for which the approval of the Ministry of Finance was obtained. A list of all the officers holding the post of Commerce and Industry Assistant 2nd Grade, together with their confidential files and the scheme of service for the post, were sent by the respondent to the Departmental Committee which was set up for the purpose. The Departmental Committee by its report dated 17.5.1985, found that the only candidates satisfying the requirements of the scheme of service and more specifically the provision for five years service in the immediately lower post, were the applicant and the two interested parties, who were, as a result, recommended for the promotion in question. 15  
20  
25

The respondent considered the report of the Departmental Committee on 29.5.1985 and postponed final consideration of the matter at a later meeting, which was to be attended, also, by the Director-General of the Ministry of Commerce and Industry. 30

At the final meeting of the respondent, which took place on 20.6.1985, the Director-General of the Ministry mentioned that all three candidates had a very good knowledge of English, that interested party Nicolaou was an excellent officer and he recommended the two interested parties. The respondent adopted the recommendations of the Head of the Department and proceeded as follows: 35

«Especially with regard to Rayias the Committee noted that during the last two years Papamichael had better Confidential Reports than Rayias who, however, had superior report in the previous year. On the basis, however, of the three established  
5 criteria as a whole and placing the proper weight to the seniority of Rayias being 15 whole years, it preferred the latter».

And the respondent finally decided to promote the two interested parties, as from 1.7.1985. The promotions were  
10 published in the official Gazette of the Republic dated 26.7.1985, as a result of which the applicant filed the present recourse.

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

1. The interested parties do not possess the qualifications  
15 required by the scheme of service.

2. The confidential reports of the interested parties are invalid as the prescribed procedure for their preparation was not followed.

3. The applicant is superior to the interested parties in merit,  
20 qualifications and seniority.

In expounding on the legal grounds counsel argued, with regard to the first ground, that the interested parties were promoted to the post of Commercial Assistant 2nd Grade on 15.3.1982 and were thus not qualified for promotion since they did not satisfy the  
25 requirement of the scheme of service for five years service in the post of Commerce and Industry Assistant 2nd Grade. Counsel submitted, making reference to the cases of *Partellides v. Republic* (1969) 3 C.L.R. 291, 296 and *Republic v. Koufettas* (1985) 3 C.L.R. 1950, 1961, that the fact that the interested parties were  
30 seconded to the post in question since 1979 cannot change their substantive status and such secondment cannot be considered as service to that post, within the meaning of the scheme of service. As a result, counsel concluded, they were wrongly considered for promotion.

35 With regard to the second ground, counsel for applicant argued that the preparation of confidential reports is regulated by circular No. 491 approved by the Council of Ministers. Counsel contended that in the case of interested party Rayias, his confidential reports for the year 1981 were changed on 7 items,

thus rendering his general assessment from «good» to «very good» without being stated who effected the said changes and without following the procedure prescribed by Reg. 9 of the said circular. Also the report of the same party for 1982 was changed in six items, thus rendering his general assessment from «good» to «very good» in contravention of the above circular in that it is not stated whether the countersigning officer discussed the matter with the reporting officer before effecting the changes.

5

Similarly one change was effected in the report of interested party Nicolaou for 1982, thus rendering him from «very good» to «excellent» and two changes in his report for 1983, which did not affect, nevertheless, his general assessment.

10

In respect of the third ground counsel argued that the applicant is at least equal in merit to interested party Nicolaou and superior to Rayias, possesses better qualifications than both of them and is also senior to them, having regard to the fact that he was holding the post of Industry Assistant 2nd Grade since 1979, whilst the interested parties were serving on an equivalent post on secondment and were promoted to it only in 1982.

15

The scheme of service for the post of Commerce and Industry Assistant 1st Grade, reads, in this respect, as follows:

20

«(1) Πενταετής τουλάχιστο υπηρεσία στη θέση Βοηθού Εμπορίου και Βιομηχανίας, 2ης Τάξης/ Εμπορικού Βοηθού, 2ης Τάξης/Βιομηχανικού Βοηθού.»

«(1) At least five years service in the post of Commerce and Industry Assistant, 2nd Grade/Commercial Assistant, 2nd Grade/Industrial Assistant.»).

25

The question of the interpretation of the term «service» appearing in schemes of service in similar circumstances, has been considered by the Full Bench of this Court in the case of *The Republic v. Psaras* (1985) 3 C.L.R. 1939. The scheme of service in that case required «at least three years service» in the post of Labour Officer 2nd Grade as a qualification for promotion to the post of Insurance Officer 1st Grade. The Court after taking into consideration the provisions of section 32(2) of the Public Service Law, (Law No. 33/67) as amended by Law 10/83 to the effect that permanent officers can neither be appointed nor promoted to a temporary post, but only seconded to it, and also the fact that the available posts were temporary, concluded as follows, at p. 1945:-

30

35

«We are of the view that it was reasonably open to the appellant Commission to construe the phrase 'service in the post of Insurance Officer 2nd Grade and/or Labour Officer

40

2nd Grade' as including service in such post not only in a permanent capacity but also on secondment to a temporary post in circumstances such as those of the present case. »

5 The case of *Republic v. Psaras* was followed in *Stylianou v. Republic* (1986) 3 C.L.R. 579, 587.

10 In the light of the views expressed in *Psaras* case and bearing in mind that in the present case also, as it seems from the comparative tables attached to the opposition, the posts of Industrial Assistant 2nd Grade, (to which the applicant was appointed, being his first entry post) and Commercial Assistant (to which the interested parties were seconded, being permanent officers), available in 1979, were temporary posts, I find that it was reasonably open to the respondent Commission to consider the interested parties as possessing the qualification of five years  
15 service in the previous post.

Before proceeding to consider the second ground, I would like to clarify the position as to the disputed confidential reports of the interested parties.

20 Taking interested party Nicolaou first, it is obvious that the corrections effected in his report for 1983 were made by the reporting and not the countersigning officer and the provision of the Circular in question have, therefore, no application (see *Stylianou v. Republic* supra). In his report for 1982 there is only one change effected by the countersigning officer in red, which  
25 changed his overall assessment from very good to excellent.

In the reports of interested party Rayias for 1981 and 1982 there are a number of corrections 7 and 6 respectively, changing his overall picture. It is obvious that the corrections were made by the countersigning officer who stated that he believed that the officer  
30 has not been reported objectively.

It is the position of counsel for applicant that the countersigning officer in the case of both interested parties did not discuss the matter with the reporting officer before making the corrections, in contravention of the provisions of paragraph 9 of Cir. No. 491 the contents of which had been approved by the Council of Ministers.  
35 Counsel for the respondent did not dispute this allegation but contended that the irregularity is not material. Both counsel supported their views by making reference to cases decided by this Court.

40 The question has been considered by this court in several cases where different views were expressed.

In the case of *Christofides v. Republic* (1985) 3 C.L.R. 1127, it

was held that the failure of the countersigning officer to give reasons for disagreeing with the assessment of the reporting officer was material in view of the fact that the said report was taken into consideration by the respondent in effecting the promotions in question. 5

In *Themistocleous v. Republic* (1985) 3 C.L.R. 2652. A. Loizou, J. held that the failure of the countersigning officer to discuss his difference of opinion with the Reporting Officer was not material in the circumstances of the case. The same Judge held in *Lofitis and Another v. Republic* (1986) 3 C.L.R. 1318, that the irregularity, being the failure of the countersigning officer to make his corrections in red ink, was not material as to vitiate the report. 10

Demetriades J. held in the case of *Argyrides v. Republic* (1986) 3 C.L.R. 1488 that the failure of the countersigning officer to discuss the matter with the reporting officer before making any corrections was a material one. 15

The last case was cited with approval by Pikiis J. in his judgment in *Karpasitis v. Republic* (1986) 3 C.L.R. 1617 stating at p. 1625 that «a prior consultation is an essential safeguard for the avoidance of errors and misconceptions about the worth of public officers». (Although appeals had been filed against all the above cases, with the exception of *Karpasitis* case, these appeals were subsequently withdrawn except the one in *Argyrides* case). 20

The Full Bench in dealing with the appeal in *Argyrides* case which was filed by the Republic against the first instance judgment annulling the promotion of the interested parties on this ground, concluded that non-compliance with regulation 9 of the regulations concerning preparation of confidential reports amounts to an illegality which vitiates any decision based on it. It further held that any violation of such regulation amounts to a violation of Article 28 of the Constitution in that it defeats the expectation of every public officer to be equally treated concerning the preparation of confidential reports and that the procedure expressly set out in the regulations is to be strictly complied with in all cases. 25  
30  
35

Bearing in mind the dicta in the above case I find that in the circumstances of the present case the confidential reports were not prepared in accordance with the regulations and the assessments of the countersigning officer which have affected the general



picture of the assessment of the candidates were effected in an unwarranted way contrary to the regulations. Therefore, for the reasons stated in the appeal in *Republic v. Argyrides* (R. A. 678, in which judgment was delivered on the 11th June, 1987, not yet reported\*), which I fully endorse, the sub judice decision has to be annulled.

Notwithstanding my conclusion that the sub judice decision has to be annulled on the above ground, I will proceed to consider the remaining ground.

It is obvious that one of the reasons why interested party Rayias was preferred to the applicant was the seniority of this interested party which, as stated by the respondent in its minutes, was as much as 15 years. Having considered the dates of appointments and promotions of the parties as they appear in the tables attached to the opposition, I find that the respondent acted under a misconception of fact as to the seniority of this interested party. Seniority is governed by Section 46 of Law 33/67 as amended by section 5 of Law 10/83, which reads as follows:

«(1) Η αρχαιότης μεταξύ των υπαλλήλων κατεχόντων την αυτήν μόνιμον ή προσωρινήν θέσιν ή τάξιν της αυτής θέσεως, είτε μονίμως είτε προσωρινώς είτε από μηνός εις μήνα είτε επί αποσπάσει, είτε επί συμβάσει, κρίνεται βάσει της ημερομηνίας της ισχύος του διορισμού, της προαγωγής ή αποσπάσεώς των εις την συγκεκριμένην θέσιν ή τάξιν, αναλόγως της περιπτώσεως, ανεξαρτήτως του τρόπου κατοχής αυτής.

(2) Εν περιπτώσει ταυτοχρόνου διορισμού, προαγωγής ή αποσπάσεως εις την συγκεκριμένην θέσιν ή τάξιν της αυτής θέσεως, η αρχαιότης κρίνεται συμφώνως προς την προηγουμένην αρχαιότητα των υπαλλήλων.»

«(1) Seniority between officers holding the same permanent or temporary post or grade of the same post, either permanently or temporarily or from month to month or on secondment, or on contract, shall be determined on the basis of the effective date of their appointment, promotion or secondment to the particular post or grade, as the case may be, notwithstanding the manner of holding same.

(2) In the case of simultaneous appointment, promotion or secondment to the particular post or grade of the same post,

\* Reported in (1987) 3 C.L.R. 1092.

seniority shall be determined according to the officers' previous seniority.)

The applicant was appointed to the post of Industrial Assistant on 16.7.1979, while interested parties Nicolaou and Rayias were seconded to the post of Commercial Assistant 2nd Grade on 1.6.1979 and 1.3.1979 respectively. The two posts are equivalent as regards salary scales. 5

In accordance with section 46(1) as amended (vide above) the manner of holding a post is immaterial for the purposes of seniority. It is the exact date of appointment to such post that counts for purposes of seniority and it is only when such date is the same in the cases of more than one party that sub-section (2) comes into play for the purpose of calculating seniority on the basis of their appointment to their previous post and so on. The dates of the appointments and secondments of the parties are not the same in the present case; therefore section 46(2) does not apply. According to the dates of their appointments and secondments Rayias is senior to the applicant by 3 1/2 months and Nicolaou by 1 1/2 months. The respondent was therefore acting under a misconception of fact regarding the seniority of interested party Rayias and the recourse must, therefore, be annulled on this ground as well, with regard to interested party Rayias. 10 15 20

In the result recourse succeeds and the sub judice decision is hereby annulled with costs in favour of the applicant.

*Sub judice decision annulled with costs.* 25