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[TRIANTAFYLIDIS, J.]

IN THE MATTER OF ARTICLE 146 OF THE
CONSTITUTION

MICHAEL
IOANNOU
TOFARIDES
and
THE REPUBLIC OF
CYPRUS
THROUGH THE
PUBLIC SERVICE
COMMISSION

MICHAEL IOANNOU TOFARIDES,
Applicant,

and

THE REPUBLIC OF CYPRUS, THROUGH
THE PUBLIC SERVICE COMMISSION,

Respondent.

(Case No. 28/65)

Public Officers—Cyprus Broadcasting Corporation—Personnel—Appointments—Applicant's recourse against Respondent's decision to appoint Interested Party to the post of Television Studio Assistant, Cyprus Broadcasting Corporation, in preference and instead of him—Decision invalid as taken in excess and abuse of Respondent's powers to select for appointment the most suitable candidate—In that the applicant and the Interested Party were to be treated as being of equal merit at the time—And, therefore, no such difference in merit existed between them as to justify disregarding the longer experience of applicant and the recommendation by his Department in his favour—In fact the Respondent Commission failed to give due weight to the said two factors in favour of applicant and has disregarded the said recommendations of the Cyprus Broadcasting Corporation in the matter without sufficient and proper reasons—See, also, herebelow, under Administrative Law.

Administrative Law—Military Service—A basic premise of proper administration is the need to ensure, as far as possible, that the employment interests of those called up for military service should not be prejudiced by the fact that they are conscripted to serve their country—This premise has been given legal recognition by section 24 of the National Guard Law, 1964 (Law No. 20 of 1964), enacted before the sub judice decision—In the present case the decision complained of to prefer the Interested Party to the applicant, is, also, contrary to the basic premise just referred to—And has to be annulled on this ground too, as being in excess and abuse of powers—See, also, under Public Officers.

Administrative Law—Public Officers—Appointments (or pro-

motions)—Recommendations by the Head of Department or the Department itself—Must be given due weight—Not to be lightly disregarded without sufficient and proper reasons—See, also, above under Public Officers; Administrative Law.

Public Service Commission—Appointments (or promotions)—Duty to choose the most suitable candidate for appointment—Factors to be taken into account and given due weight—Relative discretion exercised, in the present case, in a defective manner and in excess and abuse of powers—See, also, under Public Officers; Administrative Law, above.

Recommendations by the Head of Department—Appointments—Due weight must be given to such recommendations which must not be disregarded without sufficient and proper reasons—See, also, under Public Officers; Administrative Law, above.

Discretionary powers—Defective exercise of—See above.

Abuse and excess of powers—See above.

Excess and abuse of powers—See above.

Military Service—Basic premise of proper administration that the employment interests of persons called up for military service should not, as far as possible, be prejudiced—See above under Administrative Law—Military Service.

National Guard—Military Service—See immediately above.

Applicant's claim in the instant recourse was for a declaration that the decision of the Respondent Commission to appoint a certain Andreas Poyiatjis, the Interested Party, in preference and instead of Applicant, to the post of Studio Assistant with the Cyprus Broadcasting Corporation, was null and void and of no effect whatsoever. The main grounds on which he challenged the appointment of the Interested Party was that the Commission has acted in disregard of the longer experience of applicant and also in disregard of the recommendations made in his favour by the Cyprus Broadcasting Corporation. Applicant was recommended for promotion to the post in question on the 28th September, 1964 when the Administrative Secretary of the C.B.C. addressed a letter to the Respondent Commission requesting, inter alia, the filling of the aforesaid post. The Director-General C.B.C. in his letter dated 31st October, 1964 in forwarding Applicant's application

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for appointment referred to the recommendation contained in the letter of the 28.9.64 and added that the views of the Board of the C.B.C. had not been changed in the meantime and it was requested that the recommendation already made should be taken seriously into consideration. The application of the I.P. was also forwarded on that occasion by the Director-General but it was not commented at all. It was in evidence that at the material time applicant had longer service, more than a year's than the Interested Party in relation to the duties of the post of Studio Assistant. And it was also in evidence that the work of Studio Assistant can only be learned by experience.

In annulling the *sub judice* decision the Court:

Held, (1) I am of the opinion that on the material before it the Commission was properly entitled to treat applicant and the Interested Party as being more or less of equal merit. But I am not prepared to go so far as to say that it was properly entitled to treat the Interested Party as being of such superior merit, as compared with Applicant, as to reasonably justify it to disregard the factors of Applicant's longer experience and of the recommendation in his favour by the C.B.C. After all, the representative of the C.B.C. present at the interviews, Mr. Papadopoulos, who was also an immediate superior of Applicant and the Interested Party, rated both of them as "good" and did not rate the Interested Party as better than the Applicant; and no fleeting impression due to the behaviour of the Applicant and the Interested Party at the interviews could be held as being able to outweigh the considered views of Mr. Papadopoulos, which were based on actual knowledge of the work of the said two persons.

(2) Having held that Applicant and the Interested Party were to be treated as being of equal merit at the time and that, therefore, no such difference in merit existed between them as to justify disregarding the longer experience of Applicant and the recommendation in his favour, I have to reach the conclusion, also, that the Commission in fact failed to give due weight to the said two factors in favour of Applicant and has disregarded the recommendations of the C.B.C. in the matter without sufficient and proper reasons. The Commission has, in the circumstances, exercised its discretion in a defective manner

leading to an invalid decision taken in excess and abuse of its powers to select for appointment the most suitable candidate.

(3) To the extent to which the Commission has been misled into thinking that the Interested Party, because of his said past service, has had longer relevant experience than Applicant, it is clear that it has acted under a misconception of fact invalidating its relevant decision.

(4) But apart from the above, I do think that the decision of the Commission, to prefer the Interested Party to Applicant for appointment, is contrary also to a basic premise of proper administration *viz.* the need to ensure as far as possible, that the employment interests of those called up for military service should not be prejudiced by the fact that they are conscripted to serve their country; this premise has been given legal recognition by section 24 of the National Guard Law, 1964 (Law 20/64) which was enacted before the sub judice decision of the Commission. In this Case the Commission saw fit, *without sufficient reason* in my opinion, to appoint to a post (where Applicant had served for more than a year and in relation to which he had, by the time he was called up, earned the recommendation of the C.B.C. for a permanent appointment) the Interested Party, a person who had been employed temporarily in order to carry out the duties of the Applicant while Applicant was serving in the National Guard. This is entirely contrary to the above premise of proper administration. The Commission, as the appointing organ of Government, cannot act in a manner contrary to how all other employers are expected by law to act vis-a-vis their employees who are called up for military service (see section 24 above). Thus, the sub judice decision of the Commission, which is contrary to the said premise of proper administration, as well as to the spirit of the relevant legislative provisions, has to be annulled on this ground too, as being in excess and abuse of powers.

(5)(a) It has been clearly laid down in the past that the commission in exercising its discretion to appoint or promote is not to disregard lightly the recommendations of the Department concerned and should give duly its reasons when deciding to deviate therefrom. (*Theodossiou and The Republic*, 2 R.S.C.C. 44, at p. 48; *Marcoullides and The Republic*, 3 R.S.C.C. 30, at p. 34).

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(b) There can be no doubt at all, in my opinion, that in the absence of sufficient reason to the contrary, such as superiority of merit of another candidate over the recommended one, the Commission has to lean in favour of the recommended one, especially when both candidates are in the same Department and, therefore, such Department has had the opportunity to decide to recommend one and not the other.

Sub judice decision annulled.

Cases referred to:

Theodossiou and The Republic, 2 R.S.C.C. 44, at p. 48,
followed;

Marcoullides and the Republic, 3 R.S.C.C. 30, at p. 34,
followed.

Recourse.

Recourse against the decision of the Respondent Commission to appoint the Interested Party to the post of Television Studio Assistant with the Cyprus Broadcasting Corporation.

C. Phanos for the Applicant.

K. Talarides, Counsel of the Republic, for the Respondent.

Cur. adv. vult.

The following judgment was delivered by:—

TRIANTAFYLLIDES, J.: In this Case the Applicant seeks a declaration that the decision of the Respondent Commission to appoint a certain Andreas Poyiadjis, the Interested Party, in preference and instead of Applicant, to the post of Television Studio Assistant with the Cyprus Broadcasting Corporation, is *null* and *void* and of no effect whatsoever.

In these proceedings the Interested Party has been given an opportunity to take part for the protection of his interests, if he so wished, but he has elected not to do so and to leave the matter in the hands of counsel for Respondent—who, I must say, has done his very best in the circumstances.

The duties of the post of Studio Assistant are: “To assist the Floor Manager in the performance of his duties and perform such other duties that may be assigned to him”.

The qualifications required are: "Good education. Musical and theatrical knowledge will be considered as an advantage".

A Studio Assistant works in the television studio in relation to the presentation of television programmes.

Applicant was first employed in the service of the C.B.C., in a temporary capacity, on the 1st March, 1963, and he was posted in the Television Division. Initially he was given the task of joining together and looking after films. Soon afterwards he was assigned duties of Caption Operator and Assistant Floor Manager, in other words duties of a Studio Assistant.

In June, 1964, Applicant was called up for service in the National Guard.

After Applicant had been called up, the Interested Party was given employment, in a temporary capacity, as from the 13th July, 1964, in the Television Division, as a Studio Assistant, in order to fill the gap created by Applicant's enlistment.

The Interested Party had worked at the C.B.C. in the past, until the 10th August, 1963, on the engineering side of television broadcasts as a Technical Operator (or Control Operator). He had resigned with a view to going abroad for studies but having changed his mind he was re-employed, as above, on the 13th July, 1964.

On the 28th September, 1964, the Administrative Secretary of the C.B.C. addressed a letter to the Respondent Commission (*exhibit 2*) requesting the filling of certain posts, including two posts of Studio Assistant; the persons recommended in the said letter, for the purpose, were the Applicant and a certain Theodoros Palekis, who was also in temporary employment with the C.B.C., as a Studio Assistant, like Applicant. Palekis, at the time, had also been called up for service with the National Guard.

To *exhibit 2* there was attached, in relation to Applicant, a letter dated 23rd September, 1964, signed by Mr. Mitsides, who has been at all material times in charge of the Television Programmes Division; it was stated therein that Applicant was carrying out his duties satisfactorily and conscientiously and it was recommended that he should be given a permanent appointment (*exhibit 5*).

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The Commission met on the 6th October, 1964, and after studying *exhibit 2*, decided that the vacancies in, *inter alia*, the post of Studio Assistant should be advertised (see the minutes *exhibit 7*).

The relevant advertisement appeared in the official Gazette on the 15th October, 1964, and as Applicant was serving away from Nicosia at the time he requested the Administrative Secretary of the C.B.C. to put in an application on his behalf for appointment to the post of Studio Assistant, a thing which was duly done.

Thus, an application of Applicant for appointment dated 30th October, 1964, (*exhibit 1*) was forwarded to the Respondent Commission under cover of a letter of the Director-General of the C.B.C., Mr. Markides, dated 31st October, 1964, (*exhibit 3*). In this letter reference was being made to the recommendations contained in the letter of the 28th September, 1964, (*exhibit 2*). It was added that the views of the Board of the C.B.C. had not been changed in the meantime and it was requested that the recommendations already made should be taken seriously into consideration by the Commission.

Together with the application of Applicant for appointment, the Director-General forwarded the application of Mr. Palekis, who was also a recommended candidate, and also an application by the Interested Party (*exhibit 4*); his application was not commented upon at all.

The Commission then met on the 23rd November, 1964, (see minutes *exhibit 8*) and decided to call certain of the candidates for interview including the Applicant, the Interested Party and the said Palekis.

The interviews took place on the 7th December, 1964, in the presence of Mr. Charilaos Papadopoulos, the at the time deputy of Mr. Mitsides in the Television Programmes Division of the C.B.C. On the same day the Commission "after considering the qualifications and experience of the candidates interviewed and after giving due weight to the recommendations of the Board" decided that Palekis and the Interested Party be appointed to the two vacancies in the post of Studio Assistant (see minutes *exhibit 9*). Thus, Applicant was not appointed to the said post.

Subsequently to his appointment the Interested Party

was called up also for military service and in the meantime the Applicant has been demobilized and is back at the C.B.C., employed on a temporary basis, and carrying out the same duties as before.

The main grounds on which the appointment of the Interested Party has been challenged are that the Commission has acted in disregard of the longer experience of Applicant and also in disregard of the recommendation made in his favour by the C.B.C.

There can be no doubt that on the 7th December, 1964, Applicant had longer experience (viz. more than a year's) than the Interested Party (viz. less than five months'), in relation to the duties of Studio Assistant.

The work of Studio Assistant can only be learnt by experience, according to the evidence of Mr. Mitsides which I accept, and, as he said, it takes a new entrant 3-6 months to acquire the necessary experience for the purpose.

The Interested Party, having been appointed on a temporary basis to fill the gap created by the enlistment of Applicant, had not yet completed five months of service by the time he was given permanent appointment in the post of Studio Assistant. On the material, however, before me I am quite prepared to accept that he may, in that time, have acquired the necessary knowledge through experience.

But, experience is not an element which is solely relevant to learning one's job; it is, also, a cumulative qualification which increases, as time goes by, a person's proficiency in such job, and one cannot really say that because a person has worked for such time as is sufficient for him in order to learn how to do his job, then he is also equally proficient with someone else who has been working for a longer period of time at the same job.

Proficiency through experience is directly related to the length of time during which a person remains at a particular post, and though two persons with different lengths of service, at the same post, may have both learnt their job sufficiently well, *in the meantime, nevertheless, the one with the longer experience is normally more proficient than the other with the shorter.*

Of course, the importance of the factor of experience depends to some extent on the nature of the duties concerned;

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but, in the present Case, we have the evidence of Mr. Mitsides who stated clearly that if he had been asked in November, 1964, to recommend for appointment either the Applicant or the Interested Party, he would have recommended the Applicant, as the more experienced one.

Experience is one of the factors to be taken into account in choosing the most suitable candidate for appointment. Like other relevant factors it should tilt the scales when all other things are equal. From its minutes, *exhibit 9*, it does appear that the Commission addressed its mind to the question of experience of each candidate. It does not appear, however, why it disregarded the longer experience of Applicant.

I shall deal later on in this judgment with the, in my opinion, proper consequences on the validity of the Commission's decision of the disregard by it, in the particular circumstances of this Case, of the longer experience of Applicant, after I have examined whether or not the Interested Party and Applicant are of equal merit otherwise.

Longer experience is not the only thing in favour of Applicant which has been disregarded by the Commission. Something else, even more weighty, has been disregarded in his case: The recommendation in his favour by his superiors, (see *exhibits 2, 3 and 5*).

It has been clearly laid down in the past that the Commission in exercising its discretion to appoint or promote is not to disregard lightly the recommendations of the Department concerned and should give duly its reasons when deciding to deviate therefrom. (*Theodossiou and The Republic*, 2 R.S.C.C. p. 44 at p. 48; *Marcoullides and The Republic*, 3 R.S.C.C. p. 30 at p. 34).

There can be no doubt at all, in my opinion, that in the absence of sufficient reason to the contrary, such as superiority of merit of another candidate over the recommended one, the Commission has to lean in favour of the recommended one, especially when both candidates are in the same Department and, therefore, such Department has had the opportunity to decide to recommend one and not the other. And it is to be noted in this Case that when the Director-General of C.B.C. was forwarding (see *exhibit 3*) the application of the Interested Party—without any recommendation—he was also insisting that the previous recommendations

in favour of, *inter alia*, the Applicant, were still in full force.

The Commission appears from its relevant minutes (*exhibit 9*) to have considered the recommendations of the C.B.C. but it gives again no reason therein why it disregarded them in the case of Applicant.

In order to evaluate the consequences of the Commission's above course of action it is again necessary—as with the factor of experience—to examine the comparative merits of Applicant and the Interested Party, i.e. whether or not they were otherwise of equal merit, and I shall now proceed to do so.

In this connection I have found most useful the evidence of Mr. Protestos, a member of the Public Service Commission, and of the aforementioned C.B.C. official, Mr. Papadopoulos.

Mr. Protestos has told us that Mr. Papadopoulos, who attended the interviews of candidates before the Commission, for the purpose of assisting the Commission on technical matters, had told the Commission, after he had put questions to all candidates, that the Applicant, the Interested Party and Palekis were “good”. This has been confirmed by what Mr. Papadopoulos himself has stated to the Court, but Mr. Papadopoulos has also stated before me that he stressed at the same time to the Commission that it was the Applicant whom the C.B.C. was recommending for appointment.

Mr. Protestos has testified further that the Interested Party impressed him as answering the technical questions put by Mr. Papadopoulos better than the Applicant, but Mr. Papadopoulos in his evidence did not make such a differentiation and said that both the Applicant and the Interested Party answered his questions equally well.

Mr. Protestos has, also, testified that the Interested Party made a better impression on him at the interviews, than the Applicant, and that he did make a note of it at the time.

On the basis of the above, I am of the opinion that on the material before it the Commission was properly entitled to treat Applicant and the Interested Party as being more or less of equal merit. But I am not prepared to go so far as to say that it was properly entitled to treat the Interested Party as being of such superior merit, as compared with Applicant, as to reasonably justify it to disregard the factors

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of Applicant's longer experience and of the recommendation in his favour by the C.B.C. After all, the representative of the C.B.C. present at the interviews, Mr. Papadopoulos, who was also an immediate superior of Applicant and the Interested Party, rated both of them as "good" and did not rate the Interested Party as better than the Applicant; and no fleeting impression due to the behaviour of the Applicant and the Interested Party at the interviews could be held as being able to outweigh the considered views of Mr. Papadopoulos, which were based on actual knowledge of the work of the said two persons.

Having held that Applicant and the Interested Party were to be treated as being of equal merit at the time and that, therefore, no such difference in merit existed between them as to justify disregarding the longer experience of Applicant and the recommendation in his favour, I have to reach the conclusion, also, that the Commission in fact failed to give due weight to the said two factors in favour of Applicant and has disregarded the recommendations of the C.B.C. in the matter without sufficient and proper reasons. The Commission has, in the circumstances, exercised its discretion in a defective manner leading to an invalid decision taken in excess and abuse of its powers to select for appointment the most suitable candidate.

It appears to me quite probable that the Commission has erroneously regarded the Interested Party as being actually more experienced than Applicant, because he had stated in his application (*exhibit 4*) that he had served for two years in the technical department of television. He was referring obviously to his past service on the engineering side of television. On the material before me, it is clear that such service involved work of totally different nature, outside the studio, which could not have afforded him any really useful experience in relation to the duties of a Studio Assistant. To the extent to which the Commission has been misled into thinking that the Interested Party, because of his said past service, has had longer relevant experience than Applicant, it is clear that it has acted under a misconception of fact invalidating its relevant decision.

But apart from the above, I do think that the decision of the Commission, to prefer the Interested Party to Applicant for appointment, is contrary also to a basic premise of proper

administration viz. the need to ensure, as far as possible, that the employment interests of those called up for military service should not be prejudiced by the fact that they are conscripted to serve their country; this premise has been given legal recognition by section 24 of the National Guard Law, 1964 (Law 20/64) which was enacted before the sub judge decision of the Commission. In this Case the Commission saw fit, *without sufficient reason* in my opinion, to appoint to a post (where Applicant had served for more than a year and in relation to which he had, by the time he was called up, earned the recommendation of the C.B.C. for a permanent appointment) the Interested Party, a person who had been employed temporarily in order to carry out the duties of the Applicant while Applicant was serving in the National Guard. This is entirely contrary to the above premise of proper administration. The Commission, as the appointing organ of Government, cannot act in a manner contrary to how all other employers are expected by law to act *vis-a-vis* their employees who are called up for military service (see section 24 above). Thus, the sub judge decision of the Commission, which is contrary to the said premise of proper administration, as well as to the spirit of the relevant legislative provisions, has to be annulled on this ground too, as being in excess and abuse of powers.

For all the above reasons I am of the opinion that the decision of the Commission to appoint the Interested Party should be declared as *null* and *void* and of no effect whatsoever, being a decision reached in abuse and in excess of the powers of the Commission. The Commission will have now to re-examine afresh, in the light of this judgment, the matter of the vacancy in question.

Regarding costs I have decided that Applicant is entitled to £20 towards his costs.

Decision complained of declared null and void. Order for costs as aforesaid.

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