

[TRIANTAFYLIDIS, J.]
IN THE MATTER OF ARTICLE 146 OF THE
CONSTITUTION
MICHAEL MICHALA,

Applicant,

and

THE REPUBLIC OF CYPRUS, THROUGH
THE PUBLIC SERVICE COMMISSION,

Respondent.

(Case No. 27/67).

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*Greek Communal Chamber—Abolition thereof on March 31, 1965—
Transfer of the Exercise of its powers—The Transfer of the Exe-
cise of the Competences of the Greek Communal Chamber and
the Ministry of Education Law, 1965 (Law No. 12 of 1965)—
Applicant formerly a school-clerk in the Education Office
of the Greek Communal Chamber—Classified as school clerk,
3rd Grade, by a decision taken in December, 1964 by the then
Review Committee in the said Education Office— Decision,
however, not implemented prior to the abolition on March
31, 1965, of the Greek Communal Chamber—Competence
of the Respondent Public Service Commission to decide in
the matter as successor to the former competent organs of
the abolished Chamber—Duty of the Public Service Commission
to give effect to the aforesaid decision of the Review Committee
by appointing the Applicant as a school-clerk, 3rd grade, with
retrospective effect so far as this can be done regard being
had to existing vacancies in the relevant organic posts—But,
in any case, the Commission is bound to give forthwith to the
Applicant the benefit of a retrospective appointment in accordan-
ce with the previous decision taken in December, 1964 by
the former Review Committee, supra—By emplacing him
accordingly in the relevant salary scale—The School-clerks
of Communal Schools Law, 1961 (Greek Communal Law
No. 11 of 1961); the School-clerks of Communal Secondary
Education Schools Law, 1964 (Greek Communal Chamber
Law No. 8 of 1964); The Transfer of the Exercise of the
Competences of the Greek Communal Chamber and the Mini-
stry of Education Law, 1965 (Law No. 12 of 1965), sections
No. 3(3)(e) and 7— Decision of the Council of Ministers
4628 of the 21st April, 1965.*

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Public Service Commission—School-clerks, Ministry of Education—Appointments, promotions etc.—Matter within the competence of the said Commission (and not within that of the Educational Service Committee set-up under section 7(2) of Law No. 12 of 1965, supra)—Decision of the Council of Ministers No. 4628 of the 21st April, 1965; section 3(3)(e) of Law No. 12 of 1965, supra.

Public Officers—Appointments or promotions—Retrospectivity—The duty of the Respondent Commission in this case to appoint Applicant with retrospective effect (supra) does not offend against the principle prohibiting retrospectivity of administrative acts—Because in the present case the appointment of the Applicant had already been decided in 1964 by the then Review Committee (supra) and the Respondent Commission, as a successor to that organ, was called upon to give effect to such previous decision, in the exercise of its powers.

Administrative Law—Administrative acts or decisions—Principle of non-retrospectivity—Not affected in the present case—See above.

Administrative Law—Administrative acts or decisions—Decision being the product of a defective and incomplete exercise of the relevant powers by the organ concerned; and, therefore, reached in abuse and excess of powers.

Retrospectivity—Principle against—Position in the present case distinguishable—See above.

Abuse and excess of powers—See above.

By this recourse under Article 146 of the Constitution the Applicant complains against a decision of the Respondent Public Service Commission dated the 7th December, 1966, that his appointment, as a school-clerk 3rd grade, in the Ministry of Education, should be with effect as from December 1, 1966, and not as from November 1, 1961 as he was claiming.

This case illustrates certain problems which arose from the abolition on March, 31, 1965 of the Greek Communal Chamber and the consequent transfer of its powers to the Republic under the Transfer of the Exercise of the Competences of the Greek Communal Chamber and the Ministry of Education Law, 1965 (Law No. 12 of 1965).

Before the aforesaid statutory date (*i.e.* March, 31, 1965) the Applicant was a school-clerk in the service of the Education

Office of the Greek Communal Chamber. After certain events and as a result of a complaint lodged by the Applicant, claiming appointment as a school-clerk, 3rd grade, as from November 1, 1961, the Review Committee in the said Education Office decided, on the 10th December, 1964, to classify the Applicant as a school-clerk 3rd grade. This decision was affirmed by the said Review Committee on the 5th February, 1965. However, because of the impending dissolution (or rather, abolition) of the Greek Communal Chamber (*supra*), no steps were taken to implement the decision of the Review Committee in the case of the Applicant and in other similar cases as well, until the dissolution of the Chamber on March, 31, 1965.

On the 26th May, 1965 the Attorney-General advised that the aforesaid decisions of the former Review Committee could be implemented only to the extent to which there existed, for the purpose, vacant organic posts. On the 2nd November 1966, the Attorney-General gave further advice to the effect that the Respondent *Public Service Commission* had a duty to appoint the school-clerks in question in accordance with the decisions of the Review Committee; and that such appointments would not amount to appointments or promotions in the ordinary course, but to steps taken by the Administration in order to meet its existing legal obligations.

On November 3, 1966 the Council of Ministers decided to request the Respondent Commission to fill the vacant posts of school-clerks and to inform it that, in accordance with the advice of the Attorney-General, it had a duty to appoint the school-clerks concerned (one of whom was the Applicant) in *accordance* with the already taken decisions of the former Review Committee. On the 7th December 1966 the Respondent Public Service Commission decided to appoint Applicant as a school-clerk 3rd grade with effect as from the 1st December 1966. It is against this decision that the Applicant has filed the present recourse.

Annulling the aforesaid decision of the Respondent Commission, the Court:-

Held, (1). In handling the matter in question, the Respondent Commission was not dealing with promotions or appointments in the ordinary course but it was fulfilling an already existing legal obligation of the Administration. But in order to fulfil such obligation, the Commission was bound

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to give retrospective effect to the appointment of the Applicant as a school-clerk, 3rd Grade, in so far as this could be done in the exercise of its powers *i.e.* to the extent to which a vacant organic post of school-clerk, 3rd grade, enabled this to be done; and we know from *exhibit* 10 that there did exist such a vacant organic post for sometime before October, 1966. So, in the absence of any cogent reason to the contrary, I do fail to see why the appointment of the Applicant was made with effect as from the 1st December 1966, only.

(2) This was not at all a case where the Commission was called upon to act contrary to the general principle prohibiting *retrospectivity of administrative acts*, because the appointment of the Applicant, as a school-clerk, 3rd grade, had already been decided upon by the Review Committee (in 1964 and early in 1965) and the Respondent Commission, as a successor to that organ, was being called upon to give effect to such decision, in the exercise of its powers.

(3) Moreover, and in any case, the Commission had to consider giving, *in the present*, to the Applicant, the benefits of a retrospective appointment—in accordance with the previous decision of the Review Committee—by emplacing him accordingly in the relevant salary scale, which it has failed to do (see the case *Kyprianides and The Republic* (1965) 3 C.L.R. 519).

(4) In the circumstances, the *sub judice* decision is the product of defective and incomplete exercise of its relevant powers and, therefore, it was reached in abuse and excess of powers. It has, thus, to be annulled with an order for costs in the sum of £20 in favour of Applicant.

Sub judice decision annulled.
Order for costs as aforesaid.

Cases referred to:

Kyprianides and The Republic (1965) 3 C.L.R. 519.

Recourse.

Recourse against a decision of the Respondent Public Service Commission that Applicant's appointment, as a school-clerk 3rd grade, in the Ministry of Education, should be with effect as from the 1st December 1966, and not as

from the 1st November, 1961.

Ph. Poetis, for the Applicant.

L. Loucaides, Counsel of the Republic, for the Respondent.

Cur. adv. vult.

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The following Judgment was delivered by:-

TRIANTAFYLIDIS, J.: In this case the Applicant complains against a decision of the Respondent Public Service Commission that Applicant's appointment, as a school-clerk, 3rd grade, in the Ministry of Education, should be with effect as from the 1st December, 1966, and not as from the 1st November, 1961.

Such appointment was announced to the Applicant by letter dated the 13th December, 1966 (see *exhibit 2*). He was informed thereby that his salary would be £450.- per annum, in the salary scale of £300-£594, and that his appointment would take effect as from the 1st December, 1966.

The Applicant wrote back on the 28th December, 1966 (see *exhibit 3A*) requesting that the date of effect of his appointment be reconsidered; he stated, *inter alia*, that it had been promised by the Director of the Education Office, of the Greek Communal Chamber, that the final appointments of school-clerks—(in the place of originally only provisional ones)—were to be retrospective, with effect from the 1st September, 1961; he stated, further, that, in any case, the matter of his appointment as a school-clerk had been placed by him, since 1964, before the Review Committee, which was functioning in the Education Office, and that he had asked such Committee to make his appointment with effect as from the 1st November, 1961, when his provisional appointment as a school-clerk had been made.

The Commission re-examined the matter, on the 20th January, 1967 (see its minutes *exhibit 8*) and decided not to back-date the Applicant's appointment; it informed him accordingly by letter dated the 25th January, 1967 (see *exhibit 1*).

This recourse was filed on the 6th February, 1967.

The history of events, which have led to the appointment

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of the Applicant by the Respondent Commission, and to his request for back-dating his appointment, is as follows:-

Up to, and including, the school-year 1960/1961 the Applicant was a school-clerk employed by the School Committee of Famagusta, at one of the secondary education schools in Famagusta; his salary scale was £300-£540.

By virtue of the School-Clerks of Communal Schools Law, 1961 (Greek Communal Chamber Law, 11/61) his post came under the Greek Communal Chamber.

The Education Office of the Chamber gave him, in November, 1961, an appointment as a school-clerk, in respect of the school year 1961/1962, with a salary scale of £264-£426.

In answer to relevant protests of the Applicant, and of other school-clerks, the Education Office replied that the appointments made in November, 1961, were of a provisional nature and, as such, they had not been based on the proper criteria relevant to each individual case; it was promised that proper appointments would be made in due course (see *exhibit 3B*, attached to *exhibit 3A*).

No new appointments were made, however, until October, 1964, when the Applicant was given an appointment, under the School-Clerks of Communal Secondary Education Schools Law, 1964 (Greek Communal Chamber Law, 8/64), which repealed the aforementioned Greek Communal Law 11/61. By virtue of such appointment the Applicant was classified in the 4th grade, with a salary scale of £264-426.

As a result the Applicant complained to the Review Committee in the Education Office, claiming appointment as a school-clerk, 3rd grade, as from the 1st November, 1961.

On the 10th December, 1964, the Review Committee dealt (see its minutes *exhibit 11*) with the complaint of the Applicant and it decided, in the light of the material before it, to classify the Applicant as a school-clerk, 3rd grade.

This decision of the Review Committee had to be reconsidered on the 5th February, 1965 (see its minutes *exhibit 13*), because it had been returned to it for the purpose by the President of the Greek Communal Chamber (see *exhibit 12*); after reconsideration, the Review Committee decided to maintain the view it had taken on the 10th December, 1964.

Because of the impending dissolution of the Greek Communal Chamber no steps were taken to implement the decisions of the Review Committee, in the case of the Applicant and in other similar cases, until the dissolution of the Chamber in March, 1965.

On the 21st April, 1965, the Council of Ministers took decision No. 4628, under section 7 of the Transfer of the Exercise of the Competences of the Greek Communal Chamber and the Ministry of Education Law, 1965 (Law 12/65); it decided, *inter alia*, that the structure of the services of the Ministry of Education should include 34 posts of school-clerks, 3rd grade, and that such posts, like all other posts of school-clerks, should come under the competence of the Respondent Public Service Commission (see *exhibit 9*).

Then on the 25th May, 1965, the Attorney-General of the Republic was consulted in the matter of school-clerks who had been, already, re-classified, like the Applicant, by the Review Committee; and on the 26th May, 1965, he advised (see *exhibit 5*) that the relevant decisions of the Review Committee, which had not been implemented, could be implemented only to the extent to which there existed, for the purpose, vacant organic posts.

On the 25th October, 1966, a submission was made, by the Ministry of Education, placing before the Council of Ministers (see *exhibit 10*) the matter of the implementation of the aforesaid decisions of the Review Committee, as there existed vacant organic posts for the purpose.

On the 2nd November, 1966, the Attorney-General gave further advice (see *exhibit 5A*) to the effect that the Public Service Commission had a duty to appoint the school-clerks in question in accordance with the decisions of the Review Committee; and that such appointments would not amount to appointments or promotions in the ordinary course, but to steps taken by the Administration in order to meet its existing legal obligations.

On the 3rd November, 1966, the Council of Ministers, by decision No. 6094 (see *exhibit 6*), decided to request the Commission to fill the vacant posts of school-clerks and to inform it that, in accordance with the advice of the Attorney-General, it had a duty to appoint the school-clerks concerned—who were mentioned in the relevant submission,

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exhibit 10, and one of whom was the Applicant)—in accordance with the already taken decisions of the Review Committee.

On the 7th December, 1966, the Commission decided (see its minutes *exhibit 7*) to appoint the Applicant as a school-clerk, 3rd grade, with effect as from the 1st December, 1966; and, as already stated, it communicated this decision to the Applicant by letter dated the 13th December, 1966 (*exhibit 2*).

During the course of the hearing of this case there was raised by the Court the question of the competence of the Public Service Commission to decide, at all, in the matter of the appointment of the Applicant.

Having heard argument on this point, I am satisfied that the Commission was competent to deal with the matter, because the Applicant is not one of the persons who come within the competence of the Educational Service Committee, set up under section 7(2) of Law 12/65; and by Appendix B to its decision No. 4628 (*exhibit 9*) the Council of Ministers has entrusted the competence, in relation to posts of school-clerks, to the Commission, as it was entitled to do under section 3(3)(e) of Law 12/65.

Coming now to the validity of the *sub judice* decision of the Commission, it is useful to have in mind its relevant minutes, of the 20th January, 1967 (*exhibit 8*), which read as follows:-

"Representations of School Clerks, Ministry of Education
Ref. para. 4 of minutes of 7.12.66.

Certain School Clerks, in reply to the offer of appointment made to them have submitted representations requesting that the date of their promotion be back-dated to the 1st September, 1961, on the ground that they had been promised by the Director of Education that their promotion would be given retrospective effect.

The Commission, considered the above representations in the light of the Council of Ministers' decision No. 6094 dated 3.11.66 and the legal advice in the penultimate paragraph of the Attorney-General's letter No. 5(A)65 dated 26.5.65 enclosed in the Council of Ministers' deci-

sion, and decided that the School Clerks' request for back-dating their promotion be turned down".

When one peruses the above minutes, as well as the decision of the Council of Ministers of the 3rd November, 1966 (*exhibit 6*)—plus the note appearing at the bottom of *exhibit 6*—it is quite clear that the Commission had, at the material time, before it not only the advice of the Attorney-General of the 26th May, 1965, (*exhibit 5*), but it, also, had before it—together with the said decision of the Council of Ministers—copy of the advice of the Attorney-General dated the 2nd November, 1966 (*exhibit 5A*).

The Commission had before it, too, in so far as the Applicant was concerned, his letter dated 28th December, 1966 (*exhibit 3A*).

The outcome of the complaint of the Applicant to the Review Committee, regarding his classification as a school-clerk, was known to the Commission, at the material time, because of the contents of the submission of the 25th October, 1966 (*exhibit 10*) which was before the Commission—(see again the note at the bottom of *exhibit 6*).

Unfortunately, the Commission does not appear to have had before it the decision, itself, of the Review Committee (*exhibit 11*), dated the 10th December, 1964, by virtue of which the Applicant was actually classified in the 3rd grade, as a school-clerk.

The Commission, as it is stated in its relevant minutes (*exhibit 8*), proceeded to reject the request of the Applicant (and other school-clerks) for a back-dated appointment "in the light" of the decision of the Council of Ministers No. 6094 of the 3rd November, 1966 (*exhibit 6*) and of the penultimate paragraph of the advice of the Attorney-General, of the 26th May, 1965 (*exhibit 5*).

As regards the said decision of the Council of Ministers I can find nothing therein which justified the course adopted by the Commission in the matter; it clearly pointed out to the Commission that, on the strength of the advice of the Attorney-General, the school-clerks concerned, such as the Applicant, had to be appointed in accordance with the previous decisions of the Review Committee.

The advice of the Attorney-General to which the decision

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of the Council of Ministers referred was, obviously, that of the 2nd November, 1966 (*exhibit 5A*), which was to the effect—and rightly so— that the Commission, in handling the matter in question, was not making promotions or appointments in the ordinary course, but it was fulfilling an already existing obligation of the Administration.

In order to fulfil such obligation the Commission was bound, in my opinion, to give retrospective effect to the appointment of the Applicant, as a school-clerk, 3rd grade, in so far as this could be done in the exercise of its powers.

The Commission had to consider giving retrospective effect to the appointment of the Applicant—from the point of view of the actual date of its taking effect— to the extent to which a vacant organic post of school-clerk, 3rd grade, enabled this to be done; and we know from the submission to the Council of Ministers of the 25th October, 1966 (*exhibit 10*) that there did exist such a vacant organic post for sometime before October, 1966; so, in the absence of any cogent reason to the contrary, which, if it existed, had to be stated in the relevant minutes of the Commission, I do fail to see why the appointment of the Applicant was made with effect as from the 1st December, 1966 only. Apparently, the Commission erroneously thought that this aspect had been disposed of by the penultimate paragraph of the advice of the Attorney-General of the 26th May, 1965 (*exhibit 5*), which, however, referred, only, to the absence *then* of a suitable vacant organic post; it did not preclude the making of a retrospective appointment once a vacancy had occurred.

The Commission, in this respect, ought to have ascertained since when there existed a vacant organic post, enabling the appointment of the Applicant, as a school-clerk, 3rd grade, to be given retrospective effect, in fulfilment of the obligation of the Administration, arising by virtue of the decision of the Review Committee in favour of the Applicant. This was not at all a case where the Commission was called upon to act contrary to the general principle prohibiting retrospectivity of administrative acts, because the appointment of the Applicant, as a school-clerk, 3rd grade, had already been decided upon by the Review Committee, and the Commission, as a successor to that organ, was being called upon to give effect to such decision, in the exercise of its relevant powers.

Moreover, and in any case, the Commission had to consider giving, *in the present*, to the Applicant, the benefits of a retrospective appointment—in accordance with the previous decision of the Review Committee—by emplacing him accordingly in the relevant salary scale; and it is quite clear, from the salary which it offered to the Applicant, that it has failed to follow such a course.

In this connection attention is drawn to the Judgment of this Court in *Kyprianides* and *The Republic* (1965) 3 C.L.R. 519.

And if the Commission had decided to emplace the Applicant in the relevant salary scale, according to the consequences of the decision, in his favour, of the Review Committee, and action giving effect to such decision of the Commission were to be required on the part of any other organ, it would then be up to such organ to act, too, accordingly, in fulfilment of the existing relevant obligation, in the matter, of the Administration.

In view of the clearly obvious requirement that the Commission should have considered emplacing the Applicant in the relevant salary scale in accordance with the previous decision of the Review Committee, and in the absence of any cogent reason in the relevant minutes of the Commission, as to why this was not done, I am forced to the conclusion that the Commission failed to pay due regard to this most material aspect of the matter; as it has failed, too—as already pointed out—to pursue sufficiently the other most material aspect, namely, the question of making the Applicant's appointment retrospective from the point of view of the actual date of effect of his appointment.

In the circumstances, I have reached the conclusion that the Commission's *sub judice* decision is the product of a defective and incomplete exercise of its relevant powers and, therefore, it was reached in abuse and excess of powers; it has, thus, to be declared null and void and of no effect whatsoever.

In view of this it is not necessary to deal with the Applicant's complaint for discriminatory treatment.

The matter of the date of taking effect of the appointment of the Applicant, as a school-clerk, 3rd grade, has to be

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re-examined now by the Commission in the light of this Judgment.

Regarding costs I have decided to order Respondent to pay the Applicant £20 costs, including costs awarded on the 30th May, 1967.

*Sub judice decision annulled.
Order for costs as aforesaid.*