

[LOIZOU, J.]

IN THE MATTER OF ARTICLE 146 OF THE
CONSTITUTION

PANTELAKIS Z. KYPRIANIDES,

Applicant,

and

THE REPUBLIC OF CYPRUS, THROUGH
THE PUBLIC SERVICE COMMISSION,

Respondent.

(Case No. 251/66).

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*Public Officers—Promotions—Promotion with retrospective effect—
Recourse against decision of Respondent regarding effective
date of Applicant's promotion—See, also, herebelow.*

*Administrative Law—Public Service Commission—Original decision
thereof annulled by the Court—Reconsideration of the matter
in the light of that judgment—New decision taken—Facts
to be taken into account in reaching the new decision—All
facts existing at the time of the original decision irrespective
of whether the decision annulled was in effect based on such
facts or not—The Commission not being bound to base their
new decision exclusively on the facts and circumstances on
which their original decision was based.*

*Administrative Law—Discretionary powers—Public Service Com-
mission—Principles on which the Court will interfere with
a decision of the Public Service Commission—So long as
their decision was reasonably open to them the Court will
affirm it—Even if in exercising its own discretion on the merits
the Court could have reached a different conclusion.*

*Discretionary powers of a collective administrative organ—Principles
upon which the Court is empowered to interfere—See above*

*Decision—Administrative decision annulled by the Court—Recon-
sideration of the matter—New decision reached—Facts and
circumstances to be taken into account—See above under
Administrative Law.*

*Reconsideration of a matter by the administration after its original
decision had been annulled by the Court—See above under
Administrative Law; Decision.*

Retrospective promotions—See above under Public Officers.

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Promotions—Promotions with retrospective effect—See above under Public Officers.

By this recourse the Applicant challenges the decision of the Respondent Commission dated the 5th July 1966, to the effect that the effective date of his promotion to the post of Land Officer in the Department of Lands and Surveys should remain the 1st January, 1963 and seeks a declaration that such decision is *null* and *void* as being contrary, *inter alia*, to the decision of the Supreme Court in Applicant's former recourse No. 132/63 (reported in (1965) 3 C.L.R. 519) and/or having been made in excess or abuse of powers. The facts of this case are very shortly as follows:

In 1958 the Applicant was a Land Clerk, 1st Grade, posted at Limassol. As from the 4th December, 1958, he was instructed to perform the duties of Director of the Lands Office at Limassol and on the 18th December, 1958 his acting appointment with effect from the 4th December 1958 as Lands Officer Class II, was published in the Official Gazette. On the 2nd May, 1963, the Respondent Public Service Commission considered the filling of the vacant posts of Lands Officer and decided to promote nine persons, including the Applicant to these vacant posts; the promotion of five of them, including the Applicant, was to be with effect from 1st January, 1963, and in the case of the other four as from the 1st May, 1963. The Commission did not deal with the question of the grant of additional increments to the officers thus promoted, but decided to inform the Director of the Department of Lands and Surveys that he could take up this matter with the Minister of Finance. The Applicant always took the position that he was aggrieved by the decision of the Commission to make his promotion with effect from the 1st January, 1963 only and not with effect from the date when he was appointed as Acting District Lands Officer, *viz.* from the 4th December, 1958 (*supra*). Hence his aforesaid former recourse No. 132/63 (*supra*), as a result of which the Court declared the aforementioned decision of the Public Service Commission dated the 2nd May, 1963 *null* and *void* but only in so far as it related to the date on which the Applicant's promotion became effective. The Grounds upon which the decision was annulled were (a) the failure of the Commission to deal with the question of increments themselves and (b) the wrong principle applied by them in considering the question of the retrospective effect of the Applicant's

promotion and more particularly because their decision not to make the said promotion with retrospective effect as claimed was not based on the merits of the case but on preconceived policy. The judgment in that recourse No. 132/63 concludes as follows:

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"For all the reasons stated in this Judgment, it is hereby declared that the decision of the Public Service Commission to make the promotion of Applicant with effect from the 1st January, 1963, is null and void and of no effect whatsoever. The promotion itself is not annulled, only the decision regarding the date of its effect. The Commission has now to reconsider the matter of the date of effect of the promotion of the Applicant in the light of this Judgment."

This the Commission proceeded to do on the 5th July, 1966, when they took the new decision, subject-matter of the present recourse, that the effective date of the Applicant's promotion should remain the 1st January, 1963, as it was originally decided (*supra*).

It was argued by counsel for the Applicant that in considering afresh this case the Respondent Commission took into account matters other than those which they considered at the time of their original decision and he submitted that once that decision was annulled the new decision had to be based exclusively on those facts and circumstances on which the original decision was based as having not been affected by the Judgment and not on new facts and circumstances which in any event ought to have been known to the Public Service Commission at the time the original decision was taken.

Dismissing the recourse, the Court:-

Held, (1). Once the decision was annulled and the Respondent had to reconsider the case it was perfectly legitimate for them to take into account all facts which existed at the time of the original decision irrespective of whether the decision annulled was in effect based on such facts or not, and they were not bound to base their new decision exclusively on the facts and circumstances on which the original decision was based.

(2) With regard to the two particular grounds as a result of which the original decision was annulled *i.e.* the question

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of increments and that of the retrospective promotion, it is quite clear both from the documents put in evidence that the Respondent Commission paid due regard to both these matters before taking their new decision.

(3) It has been stated time and again that this Court will not interfere with a decision of the Commission by substituting its own discretion for that of the Commission, and so long as a decision of the Commission was reasonably open to them, on the material before them, the Court will confirm that decision, even if in exercising its own discretion on the merits it could have reached a different conclusion.

Recourse dismissed with costs.

Cases referred to:

Kyprianides and The Republic (1965) 3 C.L.R. 519;
Constantinou and The Greek Communal Chamber (1965)
3 C.L.R. 96.

Recourse.

Recourse against the decision of the Respondent to the effect that the effective date of the Applicant's promotion to the post of Land Officer in the Department of Lands and Surveys should remain the 1st January, 1963.

G. Cacoyiannis, for the Applicant.

A. Frangos, Senior Counsel of the Republic, for the Respondent.

Cur. adv. vult.

The following Judgment* was delivered by:

LOIZOU, J.: By this recourse the Applicant challenges the decision of the Respondent to the effect that the effective date of the Applicant's promotion to the post of Land Officer in the department of Lands and Surveys should remain the 1st January, 1963 and seeks a declaration that such decision is *null and void* and of no effect whatsoever as being contrary to the provisions of the Constitution and/or contrary to the decision of the Supreme Court in recourse No. 132/63 and/or as having been made in excess and/or in abuse of powers.

There is a long history behind these proceedings and in fact this is the third recourse by the Applicant on substantially

* For final decision on appeal see (1970) 6 J.S.C. 608 to be reported in due course in (1970) 3 C.L.R.

the same subject-matter. But for the purposes of this present case it is only necessary to refer to recourse No. 132/63, the Judgment in which was delivered on the 30th October, 1965 and by the Judgment the decision complained of in the said recourse was declared *null* and *void* and of no effect and it was directed that the matter should be reconsidered in the light of the Judgment. The Judgment in recourse No. 132/63 is reported in (1965) 3 C. L. R. at p. 519. The facts which led up to that recourse and which are also material in the present case are given in the said Judgment of the court at p. 524 et seq. and have been adopted in the present case. They are shortly as follows:

In 1958 the Applicant was a Land Clerk, 1st Grade, posted at Limassol.

On the 4th December, 1958, the Land Officer posted at Limassol at the time, a certain Mr. Savvides, went on leave prior to his retirement which was due on the 26th February, 1959. As from the 4th December, 1958, the Applicant was instructed to perform the duties of Director of the Lands Office at Limassol and on the 18th December, 1958, his acting appointment, with effect from the 4th December, 1958, as Lands Officer, Class II, was published in the Gazette.

This acting appointment went on until May, 1963, when the Applicant was promoted to the post of Lands Officer. (By this time, it would appear, the two classes of Lands Officer had been amalgamated into one uniform post). The Public Service Commission which had been dealing with the vacancies in the various government departments in turn, came to deal, as from 1962, with the Department of Lands and Surveys and on the 2nd May, 1963, it considered the filling of the vacant posts of Lands Officer. They decided to promote nine persons, including the Applicant, to these vacant posts; the promotion of five of them, including the Applicant, was to be with effect from the 1st January, 1963, and in the case of the other four as from the 1st May, 1963.

The Commission did not deal with the question of the grant of additional increments to the officers thus promoted, but decided to inform the Director of the Department of Lands and Surveys that he could take up this matter with the Minister of Finance, if he so thought proper.

On the 6th May, 1963, the Commission informed the Applicant by a letter of even date of their decision; on the

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18th May, 1963, the Applicant wrote back to the Commission and informed them that he accepted the offer for promotion but he went on to say that he was aggrieved by their decision to make his promotion with effect from the 1st January, 1963, only and not with effect from the date when he was appointed as Acting District Lands Officer. Further representations by the Applicant through his counsel were dismissed by the Public Service Commission and Applicant was requested to say clearly within fifteen days whether he was prepared to accept the promotion as offered to him or not.

On the 5th July, 1963, the Applicant wrote to the Public Service Commission accepting the appointment in question at the same time reserving his rights to challenge the date of his promotion through court proceedings. In consequence recourse No. 132/63 was filed on the 31st August, 1963.

As stated earlier on, having heard the case the court declared the decision of the Public Service Commission *null* and *void* in so far as it related to the date of the effect of the Applicant's promotion. The grounds as a result of which the decision was annulled were (a) the failure of the Commission to deal with the question of increments themselves, as they ought to have done, instead of leaving it to the Head of Applicant's department to take up the matter with the Ministry of Finance, if he so thought proper and (b) the wrong principle applied by them in considering the question of the retrospective promotion of the Applicant and more particularly because their decision not to make Applicant's promotion with retrospective effect was not based on the merits of the case but on preconceived policy.

In dealing with ground (a) the court had this to say (at pp. 527-8).

“When the Commission decides to promote an officer to a post, in which he has been acting for such a length of time as to give rise to the issue of whether or not his promotion ought to relate back to his acting service or any proper part thereof, as the case may be, and this is to be done, if decided upon, through the grant to such officer of increments above the minimum salary of the salary scale attaching to the post to which he is being promoted, as in the present Case, it is the duty of the Commission to decide the question of such in-

crements, because it is part and parcel of the effect of the promotion itself.

By somehow leaving aside the question of the granting of increments to Applicant, the Commission, in dealing with the date of effect of Applicant's promotion, has failed to pay due regard to a most relevant consideration and has omitted to deal with a most vital aspect of the matter, thus bringing about an incomplete and defective exercise of its relevant discretion; consequently it has become necessary to annul its *sub judice* decision. (Vide *Constantinou and The Greek Communal Chamber*, (1965) 3 C.L.R. p. 96)".

After dealing with the evidence given in that recourse by a member of the Public Service Commission and commenting thereon the learned Judge had this to say with regard to ground (b) (at pp. 528-29):

"In my view, it cannot be a question of rigid policy whether or not a retrospective promotion ought to be made in a case such as the Applicant's where the acting appointment did not last for the usual reasonably short period required to fill a vacancy, but for nearly four and a half years, and during which period, through no fault of Applicant's, no decision was taken about filling the vacancy in which he was acting all along; this was a matter which ought to have been dealt with on its merits. The Commission may have paid due regard to all relevant factors, as contained in the personal file of Applicant but in the end it appears to have erroneously based itself not on the particular merits of Applicant's claim to a retrospective promotion, but on pre-conceived policy.

I am of the opinion that such an approach to the question of the retrospectivity of the promotion of Applicant constitutes, in this Case, a defective exercise of the relevant discretion of the Commission, in that it has not been based on all relevant considerations, and in the result the *sub judice* decision of the Commission has to be annulled".

and then the Judgment goes on (at p. 529) as follows:

"For all the reasons stated in this Judgment, it is hereby declared that the decision of the Public Service Com-

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mission to make the promotion of Applicant with effect from the 1st January, 1963, is *null* and *void* and of no effect whatsoever. The promotion itself is not annulled only the decision regarding the date of its effect.

The Commission has now to reconsider the matter of the date of effect of the promotion of Applicant in the light of this Judgment”.

This the Commission proceeded to do on the 5th July, 1966, and *exhibit* 1 is the extract from the minutes of that meeting which relates to the present case.

It was contended by learned counsel for the Applicant that in considering this case the Respondent took into consideration matters other than those which they considered at the time of their original decision and he submitted that once that decision was declared *null* and *void* the new decision had to be based exclusively on those facts and circumstances on which the original decision was based as having not been affected by the Judgment and not on new facts and circumstances which in any event ought to have been known to the Public Service Commission at the time the original decision was taken.

I am of the view that once the decision was annulled and the Respondent had to reconsider the case it was perfectly legitimate for them to take into account all facts which existed at the time of the original decision irrespective of whether the decision annulled was in effect based on such facts or not, and they were not bound to base their new decision exclusively on the facts and circumstances on which the original decision was based.

With regard to the two particular grounds as a result of which the original decision was annulled *i.e.* the question of increments and that of the retrospective promotion, it is quite clear both from the minutes of the meeting at which the decision complained of was taken (*exhibit* 1) and the letter by means of which the decision was communicated to the Applicant (*exhibit* 8) that the Commission paid due regard to both these matters before taking their new decision.

It has been stated time and again and it is hardly necessary to repeat it that this Court will not interfere with a decision of the Commission by substituting its own discretion for that of the Commission, and so long as a decision of the

Commission was reasonably open to it, on the material before it, the Court will confirm that decision, even if in exercising its own discretion on the merits it could have reached a different conclusion.

Having regard to all the circumstances of the case, it cannot, in my view, be said that it was not reasonably open to the Commission to reach the decision complained of and, therefore, I would not be justified in interfering with such decision.

In the result this recourse must fail and it is hereby dismissed accordingly with costs.

Application dismissed with costs.

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