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[TRIANTAFYLIDIS, J.]

YERVANT
BAGDASSARIAN
v.
THE ELECTRICITY
AUTHORITY
OF CYPRUS
AND ANOTHER

IN THE MATTER OF ARTICLE 146 OF THE
CONSTITUTION

YERVANT BAGDASSARIAN,

Applicant,

and

1. THE ELECTRICITY AUTHORITY OF CYPRUS,
2. THE REPUBLIC OF CYPRUS, THROUGH THE
PUBLIC SERVICE COMMISSION,

Respondents.

(Case No. 159/67).

Electricity Authority of Cyprus—Competence to appoint its officers after the promulgation of the Public Service Law, 1967 (Law No. 33 of 1967)—Question left open to be decided on the production of all relevant material.

Public Service Law, 1967 (supra)—Question of its constitutionality left open.

Public Service Commission—Set up under Article 124 of the Constitution—And entrusted with the competence defined under Articles 125 and 122—Its membership having been modified by the Public Service Commission (Temporary Provisions) Law, 1965 (Law No. 72 of 1965)—Such Public Service Commission, exercising competence under Article 125 (read in the light of Article 122) of the Constitution, no longer in existence—A new Public Service Commission set up under The Public Service Law, 1967 (Law No. 33 of 1967)—Which Commission no longer possesses competence over the personnel of the Electricity Authority of Cyprus—Sections 2, 4 and 5 of the latter Law 33/67—Cf. section 3 of the former Law 72/65.

Public Service—Definition in Article 122 of the Constitution—Different definition given by the Public Service Law, 1967 (Law No. 33/67) section 2.

Words and Phrases—‘Public Service’—Article 122 of the Constitution—Section 2 of the Public Service Law, 1967 (Law No. 33/67).

Constitutional Law—Doctrine of necessity—Involves an examination of the special circumstances in relation to which it is being invoked.

Necessity—Doctrine of necessity—See above under Constitutional Law.

Doctrine of necessity—See above.

Constitutional Law—Constitutionality of the Public Service Law, 1967 (supra) left open.

By this recourse under Article 146 of the Constitution the Applicant challenges, *inter alia*, the validity of a decision of the Electricity Authority of Cyprus (Respondent 1) to appoint, by way of promotion, the Interested Party, S.P., to the post of Head of the Costing Section, in the service of the Authority. The issue having been raised by the Applicant that the Authority was not the competent organ to decide upon a matter of this nature, but it was the Public Service Commission which was competent to do so under Article 125 of the Constitution, this case has been heard, on such issue, together with another three cases—17/68, 78/68 and 118/68—in which the same issue has been raised.

It is not in dispute that until the promulgation on the 30th June, 1967, of the Public Service Law, 1967 (Law No. 33 of 1967), the Public Service Commission was acting, under Article 125 of the Constitution, as the appointing authority in respect of the personnel of the Electricity Authority (Respondent 1).

Paragraphs 1 and 3 of Article 124 of the Constitution provide:

1. "There shall be a Public Service Commission consisting of a Chairman and nine other members appointed jointly by the President and the Vice-President of the Republic."

.....
3. "Each member of the Commission shall be appointed for a period of six years, but he may at any time resign his office by writing under his hand addressed to the President and the Vice-President of the Republic."

Paragraph 1 of Article 125 of the Constitution reads as follows:

1. "Save where other express provision is made in this Constitution with respect to any matter set out in this paragraph and subject to the provisions of any

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law, it shall be the duty of the Public Service Commission to make the allocation of public offices between the two Communities and to appoint, confirm, emplace on the permanent or pensionable establishment, promote, transfer, retire and exercise disciplinary control over, including dismissal or removal from office of, public officers.”

On the other hand Article 122 of the Constitution provides:

“For the purposes of this Chapter, unless the context otherwise requires—‘public office’ means an office in the public service; ‘public officer’ means the holder whether substantive or temporary or acting, of a public office; ‘public service’ means any service under the Republic other than service in the army or the security forces of the Republic and includes service under the Cyprus Broadcasting Corporation, the Cyprus Inland Telecommunications Authority and the Electricity Authority of Cyprus and any other public corporate or unincorporate body created in the public interest by a law and either the funds of which are provided or guaranteed by the Republic or, if the enterprise is carried out exclusively by such body, its administration is carried out under the control of the Republic, but does not include service in an office the appointment to or the filling of which is under this Constitution, made jointly by the President and the Vice-President of the Republic or service by workmen except those who are regularly employed in connection with permanent works of the Republic or any such body as aforesaid.”

On the 16th August 1960 (*i.e.* on Independence Day) there were appointed ten members of the Public Service Commission as envisaged by Article 124.1 (*supra*), who were to hold office for six years by virtue of Article 124.3 (*supra*). In the meantime, due to the situation in the Island having developed in such a way as to interfere with the composition and functioning of the said Commission, the Public Service Commission (Temporary Provisions) Law 1965 (Law No. 72 of 1965) was enacted on the 16th December 1965. It was thought fit, in the circumstances, to restrict the membership of the Commission to five members, including the Chairman. On the 16th August, 1966, immediately after the

expiration of the six years' term of office of the members of the Commission appointed on the 16th August, 1960, as aforesaid, there were re-appointed five members of the Commission (including the Chairman) under section 3 of the said Law No. 72 of 1965. Apparently those appointments were made *pro tempore*. On the 30th June, 1967, Law No. 33 of 1967 (*supra*) was promulgated repealing expressly Law No. 72 of 1965; and on the very next day, on the 1st July, 1967 the same five members of the Public Service Commission, who were appointed on the 16th August, 1966 (*supra*), were given new appointment under section 4 of the new Law No. 33 of 1967, which section provides that the number of the members of the Commission, including the Chairman, shall be five and that their term of office is six years.

Held, I. As to the recourse against the Public Service Commission (Respondent 2):-

(1) Viewing the appointments, made on the 16th August 1966 under the Public Service Commission (Temporary Provisions) Law 1965 (Law No. 72 of 1965), against their proper background one might be inclined, with good reason, to say that such appointments were intended to ensure somehow the continuance of the functioning of a Public Service Commission necessary for the exercise of the powers set out in Article 125 of the Constitution *i.e.*, *inter alia*, to provide for appointments in the service of the Electricity Authority. Indeed, there can be no doubt, in view of its context, that the said Law No. 72 of 1965 was intended to legislate in relation to the Public Service Commission provided for under the Constitution.

(2) In view of the repeal of Law No. 72 of 1965 by Law No. 33 of 1967 (*supra*), and in view of the appointments made on the 1st July, 1967, under section 4 of the latter Law, I am of opinion that the earlier appointments of the same persons, which were made on the 16th August, 1966 under section 3 of the former Law No. 72 of 1965, must be taken as having been terminated (see, also, section 11 of the Interpretation Law, Cap. 1).

(3) In this case the Court is not concerned with the constitutionality, in whole or in part, of the new Law No. 33 of 1967, or of anything done thereunder.

(4) Section 4 of the said Law No. 33 of 1967 does clearly provide for the setting up of a "Public Service Com-

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mission” which, by section 5 of that Law, possesses competence over members of the “public service” which phrase is defined in section 2 in a manner not including the personnel of the Electricity Authority of Cyprus (Respondent 1), whereas Article 125 of the Constitution is entrusted with competence over the personnel of the Authority in view of the definition of “public service” in Article 122 (*supra*).

(5) It follows, therefore, that when the *sub judice* appointment was made, some time after the promulgation of Law No. 33 of 1967 (*supra*), there was not in existence a Public Service Commission empowered under Article 125 of the Constitution to make such appointment, but only a “Public Service Commission” set up under Law No. 33 of 1967 and not so empowered.

(6) Therefore, the recourse against Respondent 2 (the Public Service Commission) fails and is hereby dismissed.

Held, II. As to the recourse against the Electricity Authority of Cyprus (Respondent 1), i.e. as to whether that Authority has competence to make the appointment complained of:

(1)(a) It was argued that the said Authority was so competent in view of the doctrine of necessity and because of relevant provisions to be found in the specific legislation regarding the existence of the Authority.

(b) As the application of the doctrine of necessity involves the examination of the special circumstances in relation to which is being invoked, I find myself unable, on the material before me, as yet, in these proceedings, to decide whether or not the Authority had competence to make the *sub judice* appointment.

(2) The hearing of this case has, therefore, to continue so as to enable counsel to place before the Court all the material showing how and why the said appointment came to be made, as well as any other material relevant to the determination of this case.

*Hearing of the recourse as regards
Respondent 2 dismissed; no order
as to costs.*

Cases referred to:

Markoulides and The Republic, 3 R.S.C.C. 30;
Stamatiou and the Electricity Authority of Cyprus, 3 R.S.C.C.

Recourse.

Recourse against the validity of the decision of Respondent 1 to appoint by way of promotion the Interested Party Savvas Pashoulis to the post of Head of the Costing Section, in the service of the Electricity Authority of Cyprus, in preference and instead of the Applicant.

L. Clerides, for the Applicant.

G. Cacoyiannis, for Respondent No. 1.

L. Loucaides, Counsel of the Republic, for Respondent No. 2.

Cur. adv. vult.

The following Interim Decision was delivered by:—

TRIANTAFYLLIDES, J.: In this case Applicant complains, *inter alia*, against a decision to appoint, by way of promotion, the Interested Party, Savvas Pashoulis, to the post of Head of the Costing Section, in the service of the Electricity Authority of Cyprus (to be referred to in this Decision as “the Authority”).

It is common ground that the said appointment was made by the Authority and not by the “Public Service Commission”.

The issue having been raised by the Applicant that the Authority was not the competent organ to decide upon a matter of this nature, but that it was the Public Service Commission which was competent to do so under Article 125 of the Constitution, this case has been heard, on such issue, together with another three cases—17/68, 78/68, 118/68—in which the same issue has been raised.

By this Interim Decision it is intended to resolve the aforementioned issue in so far as this is done by what follows hereinafter:—

It is not in dispute that until the promulgation of the Public Service Law 1967 (Law 33/67), on the 30th June, 1967, the Public Service Commission was acting, under Article 125, as the appointing authority in respect of the personnel of the Authority.

After, however, the enactment of Law 33/67, the “Public Service Commission” informed the Authority (by letters dated the 7th and 10th July, 1967, see *exhibits 1 and 2*, respectively) that it was no longer competent to deal with matters relevant to the personnel of the Authority.

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It has become necessary to examine the exact position regarding the functioning of a "Public Service Commission" at the material time when the *sub judice* appointment was made by the Authority (after receipt, apparently, of the aforesaid letters *exhibit 1 and 2*):

From all the material before me it appears that there were appointed, on the 16th August, 1960, ten members of the Public Service Commission, as envisaged by Article 124 of the Constitution; by virtue of paragraph 3 of such Article they were to hold office for six years, expiring on the 15th August, 1966.

In the meantime, due to the situation in the Island having developed in such a way as to interfere with the composition and functioning of the said Commission, The Public Service Commission (Temporary Provisions) Law 1965 (Law 72/65) was enacted on the 16th December, 1965. There can be no doubt, in view of its context, that Law 72/65 was intended to legislate in relation to the Public Service Commission provided for under the Constitution; but, it was apparently thought fit, in the circumstances, to restrict the membership of the Commission to five members, including its Chairman.

On the 16th August, 1966, immediately after the expiration of the term of office of the members of the Commission appointed on the 16th August, 1960, there were reappointed five members of the Commission; their new appointments were made under section 3 of Law 72/65.

Neither in the said section 3, nor in the instruments of appointment, any mention was made of the duration of the new appointments, but taking into account the nature of Law 72/65 (in view particularly of its preamble) it may be assumed that the appointments made on the 16th August, 1966, were made *pro tempore*.

Viewing the said appointments against their proper background one might be inclined, with good reason, to say that they were intended to ensure somehow the continuance of the functioning of a Public Service Commission necessary for the exercise of the powers set out in Article 125.

Then, on the 30th June, 1967, Law 33/67 was promulgated, repealing expressly Law 72/65; and on the very next day, on the 1st July, 1967, the same five members of the Public Service Commission, who were appointed on the 16th August,

1966, were given new appointments under section 4 of Law 33/67—the number of the members of the “Commission”, including its Chairman, being five, under such section 4; by virtue of the same section the term of office of the members of the “Commission”, appointed thereunder, is six years.

In view of the repeal of Law 72/65 by Law 33/67, and in view of the appointments made, as aforesaid, under section 4 of the latter Law, I take the view that the earlier appointments of the same persons, which were made on the 16th August, 1966, under section 3 of the former Law, must be taken as having been terminated (see, also, section 11 of The Interpretation Law, Cap. 1).

In this case the Court is not concerned with the constitutionality, in whole or in part, of Law 33/67, or of anything done under its provisions, this is a matter which I leave entirely open; and nothing which I say further on in this Decision should be taken as prejudging such issue of constitutionality one way or the other.

Law 33/67 has no preamble explaining its purpose, like in the case of Law 72/65. In the long title of Law 33/67 reference is made to the functioning of the “Public Service Commission”, but not also to the creation of such a “Commission”; yet section 4 of the Law does clearly provide for the setting up of a “Public Service Commission”; and in a manner which differs in some respects from the provisions of Article 124 of the Constitution.

Moreover, in section 5 of Law 33/67, which lays down the powers of the “Commission” appointed under such Law, no reference at all is made to Article 125 of the Constitution; and though the provisions of such section 5 are in many respects similar to the corresponding provisions in Article 125, nevertheless there arises the following most material, for the purposes of the present case, difference: By reading section 5 of Law 33/67 together with the relevant definitions in section 2 of the Law, and by comparing the position thus resulting with that which results when Article 125 is read together with the relevant definitions in Article 122, one is led inevitably to the conclusion that the “Public Service Commission” set up, as from the 1st July, 1967, under Law 33/67, possesses competence over members of the “public service”, which is defined in such Law in a manner not including the personnel of the Authority, whereas under

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Article 125 the Public Service Commission is entrusted with competence over the personnel of the Authority, in view of the definition of “public service” in Article 122.

It follows, therefore, that when the *sub judice* appointment was made, after the promulgation of Law 33/67, there was not in existence a Public Service Commission empowered under Article 125 to make such an appointment, but only a “Public Service Commission” set up under Law 33/67 and not so empowered.

The next question to be answered is: was the Authority competent to make the said appointment?

In this respect the argument has been advanced that, in the circumstances, it was so competent, in view of the doctrine of necessity and because of relevant provisions to be found in the specific legislation providing for the existence of the Authority—such provisions having not, admittedly, been operative, for the purpose, previously, before the enactment of Law 33/67 and while there was functioning a Public Service Commission exercising the powers under Article 125 in respect of the personnel of the Authority (see, also, *Markoulides and The Republic*, 3 R.S.C.C. 30, *Stamatiou and The Electricity Authority of Cyprus*, 3 R.S.C.C. 44).

As the application of the doctrine of necessity involves an examination of the special circumstances in relation to which it is being invoked, I find myself unable, on the basis of the material before me, as yet, in these proceedings, to decide whether or not the Authority had competence to make the appointment in question.

The hearing of this case has, therefore, to continue so as to enable counsel, and especially counsel for the Authority, to place before the Court all the material showing how and why the said appointment came to be made, as well as any other material relevant to the determination of this case; and then counsel will be entitled, of course, to address me further on the issues arising for determination; thus, the issue of the competence of the Authority has to be joined, and decided, with the merits of the case, because to a certain extent these matters might be found to overlap, once the doctrine of necessity has been invoked.

The hearing of this recourse will proceed further only in so far as the Authority, Respondent 1, is concerned.

On the other hand, it is clear that once the "Public Service Commission", which was set up under Law 33/67, was not competent to act in the matter concerned, and once—in the light of what has already been stated in this Decision—at the material time no other Public Service Commission was in existence, this recourse cannot succeed as against Respondent 2, in respect of the decision to appoint the Interested Party, or even in respect of an omission (as alleged by claim (2) of the motion for relief) to appoint the Applicant as Section Head in the service of the Authority.

This recourse, therefore, fails and it is dismissed as regards Respondent 2, but in the circumstances there shall be no order as to costs between the Applicant and such Respondent.

Hearing of the recourse as regards Respondent 1 to proceed further as directed above.

Recourse dismissed as regards Respondent 2; no order as to costs.

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