

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

PANAYIOTIS ANDREOU,

Applicant,

and

THE CYPRUS BROADCASTING CORPORATION,

Respondent.

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PANAYIOTIS
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(Case No. 37/74).

5 *Administrative Law—Misconception of fact—Promotions in the Cyprus Broadcasting Corporation—Advisory Selection Committee—Minutes of, relating to the possession by the applicant of the qualifications of “accounting experience”—Respondents acted under no misconception of fact as to the possession by applicant of the said qualification in view of the contents of the said minutes when taken as a whole and the other facts of the case.*

10 *Administrative Law—Administrative decision—Due reasoning—Decision concerning promotions to the post of Accounts Clerk 2nd/1st Grade in the Cyprus Broadcasting Corporation—Taken by the Board of the Corporation by adopting the reports of an Advisory Selection Committee—A duly reasoned one—Moreover its reasoning is supplemented by the material in the relevant file and in particular the minutes of the said Selection Committee.*

15 *Administrative Law—Administrative decision—Misconceived reasoning—When does a reasoning appear to be misconceived.*

20 *Public officers—Appointments and promotions—Paramount duty of an appointing organ to select the candidate most suitable in all the circumstances of each particular case for the post in question—Burden on applicant to establish that he possesses striking superiority over interested party—Not established by applicant that he possesses such striking superiority.*

25 This recourse was directed against the validity of the promotion of the interested party to the post of Accounts Clerk 2nd/1st Grade in the Cyprus Broadcasting Corporation.

The promotion in question was effected by the Board of the respondent corporation after adopting the reports of the Advi-

sory Selection Committee. The said Committee after examining the applications for the said post came to the conclusion that four candidates, one of whom being the applicant were “on principle, suitable as possessing the required qualifications under the scheme, and it was decided that they should be invited for an oral interview.....”. When the interview took place all candidates were examined and the minutes of the selection Committee in respect of the applicant read as follows: 5

“ He has the advantages and the examinations contained in the scheme of service, he has not, however, accounting experience, although certain of the duties of the post which he holds have some relation with accounting”. 10

Regarding the interested party the Committee stated that though “he does not possess exactly and fully the advantages of the scheme of service..... he possesses, however, more accounting experience than all the candidates.....”. 15

Counsel for the applicant contended:

- (a) That the respondent Corporation acted under a misconception of fact, to the effect that the applicant was considered by them as not possessing experience in accounting work, whereas in fact he did possess such experience. 20
- (b) That the *sub judice* decision is not duly reasoned.
- (c) That the reasoning of the *sub judice* decision was misconceived. 25
- (d) That the respondent corporation failed in their paramount duty to select the best candidate.

Held, (I) with regard to contention (a) above:

Taking the minutes of the Selection Committee as a whole it can be safely deduced that the applicant was in fact considered as possessing also experience in accounting work (see pp. 473–474 of the judgment *post*). The reference in the minutes that the interested party “possesses, however, *more* experience in accounting than all the candidates” and the use of the word “more”, suggests that the others, including the applicant, were treated as possessing less experience in accounting. Therefore, it cannot be said that the *sub judice* decision was taken under any misconception of fact. The Advisory Selection Committee 30 35

had made a study of the candidates, made a comparison between them and made its recommendation to the Board which was, by law, the competent Authority to make the selection for promotion.

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5 *Held, (II) with regard to contention (b) above:*

10 The *sub judice* decision is duly reasoned and its reasoning is supplemented by the material in the file, and in particular, the minutes of the Advisory Selection Committee which are
15 duly adopted by the Board. Its reasoning is clear and it contains the concrete factors upon which the Administration based its decision for the occasion under consideration, in such a manner as to render possible its judicial control. Furthermore, the reasoning for the *sub judice* decision is fully supplemented from the material in the relevant file.

15 *Held, (III) with regard to contention (c) above:*

20 The judicial control of misconception of fact is done through the reasoning of the administrative act, whether such reasoning is found in the body of the act or in the file of the case. The reasoning appears misconceived, when there is material ignorance
25 or wrong knowledge regarding the existence or non-existence of factual circumstances which were not taken into consideration in the first case or taken into consideration in the second. Misconceived reasoning is identical in substance and in form with misconception of fact. Therefore, my findings regarding the
30 absence of any misconception of fact apply equally to the ground of misconceived reasoning which also fails.

Held, (IV) with regard to contention (d) above:

30 (1) It is a cardinal principle of administrative law that it is the paramount duty of an appointing organ in effecting appointments or promotions, to select the candidate most suitable in all the circumstances of each particular case for the post in question. (See, *inter alia*, *Theodossiou and The Republic*, 2 R.S.C.C. 44 at p. 47).

35 (2) The burden, however, is on the applicant to establish that he possesses striking superiority over the interested party, and in the case in hand, it has not been established by the applicant that he possesses such striking superiority (p. 476 post).

Application dismissed.

Cases referred to:

Theodossiou and The Republic, 2 R.S.C.C. 44 at p. 47;

Phylactou v. The Republic (1973) 3 C.L.R. 444 at p. 455;

Korai and Another v. C.B.C. (1973) 3 C.L.R. 546 at p. 566.

Recourse.

Recourse against the decision of the respondent to promote the Interested Party to the post of Accounts clerk 2nd/1st Grade in the Cyprus Broadcasting Corporation in preference and instead of the applicant.

P. Demetriou, for the applicant.

K. Chrysostomides, for the respondent.

Cur. adv. vult.

The facts sufficiently appear in the judgment of the Court delivered by:—

A. LOIZOU, J.: By the present recourse the applicant challenges the validity of the promotion of Andreas Nicolaou (hereinafter referred to as "The interested party") to the post of Accounts Clerk 2nd/1st Grade.

The applicant was first appointed in 1964 on an entirely temporary and casual basis for general duties with any division of the respondent Corporation. His appointment was being terminated at intervals of six months and each time reappointed on the same terms and conditions until the 1st August, 1967, when he was appointed to the temporary post of storeman. His duties during the first period of his employment with the respondent Corporation were those of stores clerk. On the 3rd June, 1968 he applied for promotion to the post of clerk 2nd Grade and Mr. Evripidou, the Chief Accountant, stated that the applicant performed his duties as storeman rather satisfactorily. On the 16th April, 1970 he was appointed as clerk 2nd Grade in the Administration Department.

The post of accounts clerk 2nd Grade is a combined establishment with accounts clerk 1st Grade. The required qualifications under the relevant scheme of service (*exhibit 1 "D"*) are—"Leaving Certificate of a Secondary School. A good knowledge of Greek and English. Experience in accounting work and possession of the certificate of the Intermediate examina-

tion of the L.C.C. in book-keeping or other equivalent qualification will be considered an advantage”.

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According to the evidence of Mr. Evripidou, between the 1st July, 1969 to the 10th March, 1970, a period of about eight months, some of the duties performed by the applicant were of an auxiliary nature, as far as accounting work was concerned. Between the 10th March, 1970 to the date of his transfer to the Administration Section, namely, the 16th April, 1970, the applicant was performing accounting duties of minor nature. As from the 16th April, 1970 till October, 1973 when the deliberations in respect of the *sub judice* decision took place, the applicant was not performing accounting duties. According to the same witness, the applicant had acquired little accounting experience during the period he served in the Accounts Department under him, but could not say whether at the time the Advisory Committee considered the *sub judice* promotions, the applicant still possessed such experience, whereas the interested party had been performing accounting duties of somehow more major nature and over a longer period.

The interested party was first engaged by the respondent Corporation on the 1st July, 1971 and as from that day he was performing duties of accounting nature in the Accounts Department. According to Mr. Evripidou, after a few weeks of general training and practice, the duties of the interested party included the following which were of a purely accounting nature: Maintenance of the T.V. films, register and contracts files for every distributor; checking all invoices relating to films and prepare the payment vouchers; checking the T.V. films contracts before submission for signature; preparation of payment vouchers and local purchase orders, which were duties performed in the past by more senior officers than the officer holding the post of the interested party at the time. In other words, the interested party had pure accounting experience during the period of his service with the respondent Corporation until the date of his selection for promotion.

The Advisory Committee which is composed of representatives of the respondent Corporation and the Employees Union, met on the 29th September, 1973 and the 4th October, 1973 under the chairmanship of the Director-General for the purpose of examining the applications for the post of accounts clerk 2nd/1st Grade in the Accounts Department. It had before it, six applications, including those of the applicant and the interested

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party. The applicant was No. 6 on the list of candidates and the interested party No. 1 and the relevant minutes (*exhibit 1“C”*), read:

“ After considering the applications in conjunction with the qualifications required by the scheme of service for the post, it has been ascertained that applicants under Nos. 1, 4, 5 and 6, are, on principle, suitable as possessing the required qualifications under the scheme, and it was decided that they should be invited for an oral interview on the 4th October, 1973.

For the remaining two, Miss Eve Nicolaou and Nicos Nicolaou, the representatives of the staff expressed the view that they should also be invited to the oral interview as possessing the minimum required qualifications for the post.

It was, however, maintained by the chief accountant, that so long as there were candidates who were possessing in addition the advantages of the scheme of service for the post, the aforesaid two candidates should be excluded from the procedure, at this stage.

In spite of that, it was decided that the said two candidates be invited for oral interview like the rest, as possessing the minimum requirements of the scheme of service”.

On the 4th October, 1973, the interview took place and all the candidates were examined and on the basis of the collected material, namely, qualifications, experience and the performance of the candidates at the oral interview, the Advisory Committee, after referring to each one of the candidates, says the following, in respect of the applicant:

“ He has the advantages and the examinations contained in the scheme of service, he has not, however, accounting experience, although certain of the duties of the post which he holds have some relation with accounting”.

Then they give his qualifications which include the L.C.C., Book-keeping Elementary and Intermediate, since 1970.

Regarding the interested party Andreas Nicolaou, an employee in the Stores and Accounts Department, the minute reads:

5 “ He does not possess exactly and fully the advantages of
the scheme of service, namely, he has not passed the Inter-
mediate Examinations of the L.C.C. in Book-keeping, but
he has passed the Elementary in Book-keeping and the
Intermediate of Elements of Commerce and Arithmetic
which partly relate to the L.C.C. Book-keeping (Inter-
mediate). He possesses, however, more accounting expe-
rience of all the candidates, given that as from the date of
10 his employment with the respondent Corporation (1.7.1971),
he performs duties of accounting nature in the Accounts
Department”.

15 On the 20th December, 1973 the Board, having considered
the suggestions of the Advisory Selection Committee and
having examined the case of each candidate and having heard
the Director-General, adopted the reports of the Advisory
Selection Committee and appointed the interested party to the
post of accounts clerk as from the 16th November, 1973.

20 The main ground of law relied upon on behalf of the appli-
cant in support of the present application, is that the respondent
Corporation acted under a misconception of fact, to the effect
that the applicant was considered by them as not possessing
experience in accounting work, whereas in fact he did possess
such experience.

25 The short answer to this is that the applicant was in fact
considered by the Advisory Committee as possessing also
experience in accounting work. This is apparent from the
relevant minute of the Advisory Selection Committee which
has already been quoted verbatim. It transpires therefrom,
30 that the Committee grouped the six candidates, into two cate-
gories. The first one, which included the applicant and the
interested party, consisted of those candidates who were found
to be, on principle, suitable as possessing the required qualifica-
tions under the scheme of service. The second group which
35 consisted of two candidates, were not to be invited for oral
interview, and it was only on the suggestion of the representatives
of the staff that they should also be invited to the oral interview,
as possessing the minimum required qualifications for the post.
In the end, it was decided that the two candidates should like-
wise be invited as the rest, in spite of the stand maintained by
40 the Chief Accountant to the effect that so long as there were
“candidates who were possessing”, and I stress this, “in addition

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the advantages of the scheme of service for the post”, the said two candidates should be excluded.

It is in view of this comparison and distinction made between the two groups that it can be safely deduced that the first group was composed of those possessing not only the minimum required qualifications, but the advantages which consisted of experience in accounting work and possession of the certificate, etc. or other equivalent qualification. Consequently, by being placed in the same category as the interested party, the applicant was considered to have experience in accounting. Furthermore, from the very opening words of the remarks to be found in the minutes, (*exhibit 1“C”*) in relation to himself, “He has the advantages and the examinations which are contained in the scheme of service” it can be safely said that the advantages to which the Advisory Selection Committee was referring, was the experience in accounting work as the examinations which he passed were specifically referred to by name, in addition to the word “advantages”. In my view, the reference thereafter to the fact that he does not possess, however, accounting experience although some of the duties of his post which he possesses have some relation to accounting, must have been a reference to the degree of his experience and not to the complete absence of same. Otherwise, he would not have been placed in the category of those possessing experience in accounting, but would have been treated as Eve Nicolaou who was described as not possessing any accounting experience and therefore was considered unsuitable for the post; also, like Nicos Nicolaou who was found not to be suitable as not possessing the required accounting experience and the advantages of the scheme of service. Therefore, when it is said that the applicant had little accounting experience, according to the witness, it must be taken that it was that experience which the Advisory Committee considered as giving him the advantages under the scheme taken together with the examinations and not that they were considering him as devoid of any accounting experience. The minute should also be taken as a whole, because when they come to the interested party, they conclude their remarks to which we have already referred, by saying, “He possesses, however, more experience in accounting from all the candidates”, and the use of the word “more”, suggests that the others, including the applicant, were treated as possessing less experience in accounting. Therefore, it cannot be said that the *sub judice* decision was taken under any misconception of fact. The

Advisory Selection Committee had made a study of the candidates, made a comparison between them and made its recommendation to the Board which was, by law, the competent Authority to make the selection for promotion.

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5 This decision is duly reasoned and its reasoning is supplemented by the material in the file, and in particular, the minutes of the Advisory Selection Committee which are duly adopted by the Board. Its reasoning is clear and it contains the concrete factors upon which the Administration based its decision
10 for the occasion under consideration, in such a manner as to render possible its judicial control. Furthermore, the reasoning for the *sub judice* decision is fully supplemented from the material in the relevant file.

15 Connected with the ground of misconception of fact and the lack of due reasoning, is the ground that the reasoning was misconceived, as the judicial control of misconception of fact is done through the reasoning of the administrative act, whether such reasoning is found in the body of the act or in the file of the case, the reasoning appears misconceived, when there is
20 material ignorance or wrong knowledge regarding the existence or non-existence of factual circumstances which were not taken into consideration in the first case or taken into consideration in the second. Misconceived reasoning is identical in substance and in form with misconception of fact.

25 Therefore, my findings regarding the absence of any misconception of fact apply equally to the ground of misconceived reasoning which also fails.

30 A perusal of the relevant material that was before the Advisory Selection Committee and the Board of the respondent Corporation, as well as of the relevant minutes, leave no room for the contention that the respondent Corporation failed to carry out a due inquiry reasonably necessary, in the circumstances, for the purpose of ascertaining the correct facts.

35 The last ground of law relied upon on behalf of the applicant, is that the respondent Corporation failed in their paramount duty to select the best candidate.

40 It is indeed a cardinal principle of administrative law that it is the paramount duty of an appointing organ in effecting appointments or promotions, to select the candidate most suitable in all the circumstances of each particular case for the

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post in question. This was first set out in the much quoted case of *Theodossiou and The Republic*, 2 R.S.C.C., p. 44 at p. 47 and reiterated in a long series of cases. (Vide, *inter alia*, *Phylactou v. The Republic* (1973) 3 C.L.R. 444 at p. 455 and *Korai and Another v. The C.B.C.* (1973) 3 C.L.R. 546 at p. 566). The burden, however, is on the applicant to establish that he possesses striking superiority over the interested party, and in the case in hand, it has not been established by the applicant that he possesses such striking superiority.

The *sub judice* decision was reached in a proper exercise of administrative discretion, inasmuch as all relevant factors were taken into account and there has been no misconception of fact, no insufficient or misconceived reasoning, and the respondents did not fail in their paramount duty to select the best candidate. As it is well established, this Court will not interfere with a decision of an administrative organ by substituting its own discretion, so long as a decision was reasonably open to it on the material before it, even if, in exercising its own discretion on the merits, it could have reached a different conclusion.

For all the above reasons, the present recourse fails and the *sub judice* decision is confirmed in accordance with Article 146 (4) (a) of the Constitution, but, in the circumstances, I make no order as to costs.

Application dismissed. No order as to costs.