

1982 December 18

[HADJIANASTASSIOU, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

GEORGHIOS MIKELLIDES,

Applicant.

v.

THE EDUCATIONAL SERVICE COMMITTEE,

Respondent.

(Case No. 463/81).

5 *Educational Officers—Transfers—Trade Union status of officer disregarded—Transfer contrary to Article 21 of the Constitution and in abuse and excess of powers—Moreover respondent Committee failed to evaluate in the proper way the essential factors regarding the educational needs—Sub judice transfer annulled.*

10 The applicant a teacher of Gymnastics was on the 18th September 1981 transferred by the respondent Committee from Limassol to the Mitsis Commercial School at Lemythou. It was not in dispute that the applicant was on the 20th April, 1981 elected as a member of the Central Board of the teachers Trade Union (O.E.L.M.E.K.), which consisted of 21 members and its meetings were held at Nicosia. The applicant was a member coming from Limassol and in making the above transfer the respondent Committee failed to take into consideration
15 the Trade Union status of the applicant. Upon a recourse by the applicant against the above transfer it was mainly contended that by disregarding the election of the applicant in the Central Board of O.E.L.M.E.K. the respondent Committee acted in misconception of the essential facts.

20 *Held*, that the unique position and the duties of the applicant in the Central Board of O.E.L.M.E.K. have been totally disregarded by the respondent Committee contrary to Article 21 of the Constitution; that, therefore, the Committee failed to consider a most serious and essential factor of the case and

consequently had failed to exercise rightly their discretionary powers resulting in the annulment of the decision taken on the grounds of abuse and excess of power. (*Jordanous v. Republic* (1967) 3 C.L.R. 245 at pp. 254, 255 followed).

Held, further, that the respondent Committee failed to evaluate in the proper way and/or manner the essential factors regarding the educational needs and the sub judice decision must be annulled for this reason too. 5

Sub judice decision annulled.

Cases referred to: 10

Carayiannis v. Republic (1980) 3 C.L.R. 39 at p. 44;

Pierides v. Republic (1969) 3 C.L.R. 274;

Elia v. Educational Service Committee (1974) 3 C.L.R. 73;

Kyriakides v. Republic (1976) 3 C.L.R. 364;

Jordanous v. Republic (1967) 3 C.L.R. 245 at pp. 254, 255; 15

Sofocleous v. Republic (1982) 3 C.L.R. 786.

Recourse.

Recourse against the decision of the respondent to transfer applicant from Limassol to Mitsis Commercial School at Lemythou. 20

A. Drakos, for the applicant.

G. Constantinou (Miss), Counsel of the Republic, for the respondent.

Cur. adv. vult.

HADJIANASTASSIOU J. read the following judgment. The applicant is a teacher of Gymnastics and he was appointed on contract on the 5th September, 1970. Earlier he served on probation and he was confirmed to the post in question in 1973. 25

The facts

It is an undisputed fact before the Court that the applicant is a well known trainer engaged and was offering his services to pupil athletes and to other athletes in Limassol. He is also the national coach of the national athletes team, whose offers are broadly recognised and which have not been disputed before the Court. 30

On the 20th April, 1981, the applicant has been elected as 35

a member of the Central Board of O.E.L.M.E.K. On the 18th September, 1981, the Public Education Service Committee decided to transfer the applicant from Limassol to the Mitsis Commercial School at Lemithou. The reasons for his transfer, as appear in the minutes, were the surplus of teachers, and the relevant decision of the Committee to transfer all educationalists serving in rural school areas for a period less than two years.

The applicant objected to his transfer but his objection was overruled on 2nd November, 1981, on the ground that the applicant had not fulfilled his obligation for service in rural schools. By this recourse which was filed on 4th December, 1981, the applicant attacks the act and/or decision by which his transfer was decided.

Grounds for annulment

In this application appear the following reasons for annulment:

- (1) The respondents acted unlawfully and/or in excess or abuse of power and/or contrary to the interest of education.
- (2) Respondents acted unlawfully and/or unjustly and/or under circumstances of discrimination against the applicant and acted without proper inquiry.
- (3) Respondents failed to take into consideration and evaluate properly all relevant factors and their decision is unjustified and/or lacks reasoning and/or their reasoning is insufficient and/or wrong.
- (4) The respondents acted in a way punishing the applicant and/or acted in a way amounting to disciplinary measures and/or their act intended to secure other purposes than the educational needs.
- (5) The respondents acted contrary to the provisions of the Constitution in preventing and/or restraining the applicant from his involvement to trade-unions acts contrary to section 21 of the Constitution.

The grounds for the annulment of the decision attacked were placed before this Court in a single and solid way, the main and general argument being that the transfer of the applicant was obviously illegal. It was further mentioned and stressed by

learned counsel of the applicant that the applicant was elected in the Central Committee of O.E.L.M.E.K., a fact which was totally, as his allegation was, disregarded by the Committee reaching its decision for the transfer of the applicant, although it was an essential element to be considered. 5

Indeed, section 16 of the Educational Officers Regulations of 1972 provides for the transfer of educationalists and reads as follows:

“16—(1) Educational Officers are transferred

(a) in accordance with the educational needs. 10

(b) On their own application for serious personal or family reasons, provided that the interest of the service is also served.

(c) Educational Officers serving during the period of their probation at schools as specified in regulation 15 are liable to transfer after confirmation of their appointment or in view of their impending confirmation”. 15

The term “educational needs” is defined in regulation 13 of the above mentioned regulations, as follows:

“13. For the purposes of this post: 20

(a) without prejudice to the generality of the meaning of the term ‘educational needs’ are understood mainly:

(b) The distribution of the teaching staff including the managerial posts, in a way safeguarding the sufficient manning of schools and the balanced compositions of such staff regarding the qualifications, specialities and..... 25

In the case of Headmasters there is included the need for safeguarding stability by their stay at the same school for some years and if possible for at least four years.....”

There is no doubt that it is an established principle, founded in our case law, that the seriousness of the grounds which are evaluated by the administration in deciding whether or not the transfer of a teacher is decided is not subject to the judicial control. See Conclusions from Jurisprudence of the Greek Council of State 1929–59 p. 340. In his judgment in *Cara-yiannis v. The Republic* (1980) 3 C.L.R. 39 the Honourable 30

President of the Supreme Court Mr. Triantafyllides had this to say at p. 44:

5 "In reviewing, in the present proceedings, the exercise of the relevant discretionary powers of the Committee there must be borne in mind the principles which govern the intervention of the Court in a case of this nature, namely a recourse against a decision relating to transfer. It is well established that the evaluation, made by a competent organ, in relation to the factors militating for or against, 10 as the case may be, a transfer, is not subject to the control of an administrative Court, except where there exists improper use of the relevant discretionary powers or misconception concerning the factual situation or failure to take into account a material factor".

15 See inter alia *Pierides v. Republic* (1969) 3 C.L.R. 274, *Elia v. Educational Service Committee* (1975) 3 C.L.R. 73 and *Kyriakides v. Republic* (1976) 3 C.L.R. 364.

It was the submission of learned counsel for the applicant that the Committee by disregarding the election of the applicant 20 in the Central Board of O.E.L.M.E.K., acted in misconception of the essential facts which result in the annulment of the administrative act. In support of his argument counsel relied on *Ioardanous v. The Republic* (1967) 3 C.L.R. 245. The President of the Supreme Court Mr. Triantafyllides said the following 25 in respect of the sub judice matter at pp. 254, 255:

30 "The Commission has failed to pay due regard to the very material factor of the trade union status itself of the Applicant when deciding whether or not to transfer him with the result that Applicant's transfer has to be annulled in any case.

In my opinion, the existence and the proper and unhindered functioning of a trade union of public officers —such as the aforementioned Association—is not only a matter of fundamental rights and liberties (see Article 35 21 of the Constitution) but is also a matter directly related to the proper functioning of the public service as such;—

I take the view that as a matter of proper administration directly related to the proper functioning of the public

service, those public officers who actively participate in the affairs of their trade union should not be transferred away from Nicosia—where is the seat of their trade union—and be, thus, prevented from attending fully to their trade union duties unless there exist compelling reasons to the contrary; it follows that the Public Service Commission, in each such case, has to weigh the needs of a particular Department as against the wider interests of the Public Service in general (which are involved in the proper functioning of the public officers' trade union) and has to decide in the light of all relevant circumstances which should prevail giving due reasons in support of its relevant decision".

In the present case the applicant was elected as a member of the Central Board of O.E.L.M.E.K. four months prior to his transfer. The Central Board of O.E.L.M.E.K. has 21 members, the participation being proportionate for every district and the conferences and meetings are held in Nicosia. The applicant is a member coming from Limassol district. This very fact was not considered at all by the Committee and was totally disregarded.

Nothing is mentioned in the decision of the Committee deciding the transfer of the applicant regarding his election and the involvement in the teacher's trade union, nor I could trace anything in the personal file of the applicant inducing that the Committee considered this fact or evaluated it in any way before reaching the decision of the transfer, or further, there is nothing whatsoever mentioned or justifying the expediency of the said transfer which undoubtedly makes difficult the performance of the serious duties entrusted to the applicant by his election.

I repeat the unique position and the duties of the applicant in the Central Board of O.E.L.M.E.K. have been totally disregarded by the Committee contrary to Article 21 of the Constitution and the protection emanating from *Iordanous* case (supra) as regards syndicalism activities.

It has been alleged by the learned counsel appearing for the respondents that after the transfer of the applicant special arrangements have been made so as to enable him to participate in the meeting of O.E.L.M.E.K. In my opinion this very fact

apart from others, proves the wrong and imperfect approach of the discretionary powers of the Committee, and which is obvious of the stand followed by the Committee in this case.

At any event, in accordance with the regulations all leading members of O.E.L.M.E.K. are granted facilities in exercising their duties in the recognition of the serious part of their activities as well as the significant role of their organisation regarding the educational activities.

Indeed, in the present case it is evident that the Committee failed to consider a most serious and essential factor of the case and consequently had failed to exercise rightly their discretionary powers resulting in the annulment of the decision taken, on the grounds of abuse and in excess of power. But I would go further and state also that the decision of the Committee was based also on the fact that the applicant has not completed a service of two years in rural areas. It was made clear in the answering letter to the objection of the applicant that the applicant "has not completed his duty to serve in rural areas". It is evident that the Committee made a wrong estimation of the facts. The applicant had been appointed in 1970, then before the enactment of the Educational Officers Regulations. He was not obliged by that to serve in rural areas. He could only be transferred for reasons of "educational needs". At any event the applicant after the expiration of the probationary period he was transferred to Omodos village, his transfer though was eventually reversed, since his services were considered valuable and necessary for the athletics in Limassol a fact which the Committee did not consider. If authority is needed, the case of *Sofocleous v. The Republic*, (1982) 3 C.L.R. 786 provides the answer. Mr. Justice A. Loizou had this to say:-

It is upon the respondent Committee to exercise its discretion and decide as to which officer will be transferred to fill such vacancies, so that the educational needs of each school will be satisfied. For the proper exercise of its discretion the respondent Committee must carry out a due inquiry and consider, subject to the exigencies of the service as the paramount consideration, the personal circumstances of all officers including the hardship that it will be caused to them as well as the equality of treatment between officers

and to act in accordance with the provisions of the relevant laws and regulations, including of course the general principles of administrative Law”.

In the light of all the facts before this Court, I find that the Committee failed to evaluate in the proper way and/or manner the essential factors regarding the “educational needs”, and for the reasons stated, I would annul the decision of the Committee. 5

Consequently the present recourse succeeds and the sub judice decision is annulled.

Sub judice decision annulled. 10