1984 June 16

[A. LOIZOU, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

COSTAS IOANNOU,

Applicant,

v.

THE WATER BOARD OF LIMASSOL,

Respondent.

(*Case No.* 414/83).

Act or decision in the sense of Article 146.1 *of the Constitution—Executory act—Water Board—Public utility corporation established under the Water Supply (Municipal and Other Areas) Law, Cap.* 350*—Its decisions relating to appointment of its employees come within the domain of public Law—They are of an executory administrative nature and can be made the subject of a recourse under the above Article*—Potamitis *v.* Water Board of Limassol (1983) 3 *C.L.R.* 1121 *adopted.*

Administrative Law—Administrative acts or decisions—Reasoning—Due reasoning—Belated disclosure of, can only be allowed when there exist the relevant records from which due reasoning can be clearly derived and no such records existed in this case—Sub judice decision devoid of any reasoning—Annulled.

Practice—Evidence—Reception of evidence to explain or clarify and afortiori to add to the relevent records of the proceedings of the administration would be detrimental to the interest of good administration.

Legitimate interest—Recourse against appointment—Though applicant did not possess qualifications required under the relevant schemes of service respondents have undertaken under a collective agreement to treat applicant as qualified—Applicant has, therefore, a legitimate interest to file a recourse against the appointment of the interested party.

The applicant in this recourse sought the annulment of the appointment of the interested party to the post of Technical Assistant Grade 'B'. The sub judice decision stated simply that "at the vacant post of Technical Assistant Mr. Panikkos Panayiotou who works already for the Board appointed on contract during the last six months is appointed"; and an affidavit was filed on behalf of the respondent Board seeking to supplement its reasoning.

On the question:

(a) Whether the sub judice decision was within the domain of Private and not of Public Law, and as such could not be made the subject of a recourse under Article 146 of the Constitution;

(b) Whether the applicant had no legitimate interest in as much as he did not possess the required qualifications under the relevant scheme of service;

(c) On the merits of the recourse.

Held, (1) that the respondents are a body established under Cap. 350 which entrusts it with the duties and powers of the control and management of the water supplies in the municipal area of the town of Limassol; that it is, therefore, a body corporate which has been created for rendering services to the public and their relation with and their actions relating to their employees come within the domain of public Law, like those of any other public utility corporation rendering services to the public; that any decision, therefore, of the respondents relating to their employees, is, of an executory or administrative nature and, therefore, can be made the subject of a recourse before this Court under Article 146.1 of the Constitution of the Republic (*Potamitis* v. *Water Board of Limassol* (1983) 3 C.L.R. 1121 at pp. 1127–1128 adopted).

(2) That under the existing scheme of service and under the collective agreement entered into between the respondent Board and the Trade Unions representing its employees, there exists an undertaking by the respondent Board that in filling any vacant post will give priority to persons already in its service; that, therefore, the ground of absence of a legitimate interest must also fail as the respondent Board has itself treated the said collective agreement as adding to and supplementing the relevant

scheme of service, in respect of candidates who are already in its service.

(3) That it is very dangerous to allow evidence to explain or clarify and afortiori to add to the relevant records of the proceedings that the administration thought fit to make; that reception of such evidence would be detrimental to the interest of good administration; that the judge exercising revisional jurisdiction must exercise his wide disrectionary powers to allow or not such evidence with the utmost caution, and always bearing in mind that due reasoning containing clear and adequate reasons should be given in order to enable the Court to ascertain whether or not a decision is well founded in fact and in law; that in the circumstances of this case the addition to the minutes of the respondent Board at which the sub judice decision was taken, by relying on the aforementioned contents, of the affidavit sworn by its Manager cannot be allowed; that if this Court were to do so this would amount to add reasoning to the sub judice decision which is completely devoid of any reasoning whatsoever and there is no reasoning in relation to such decision to be derived at all from any record related thereto; and that, therefore, the sub judice decision should be annulled on the ground of lack of due reasoning, as belated disclosures of same can only be allowed when there exist the relevant records from which due reasoning can be clearly derived.

Sub judice decision annulled.

Cases referred to:

Potamitis v. *Water Board of Limassol* (1983) 3 C.L.R. 1121 at pp. 1127-1182;

Christou v. *Republic* (1969) 3 C.L.R. 134 at pp. 148, 150, 152, 156-157;

Georghiades and Others (No. 1) v. *Republic* (1965) 3 C.L.R. 473;

Arkatitis and Others (No. 1) v. *Republic* (1967) 3 C.L.R. 29;

Papaleontiou v. *Republic* (1967) 3 C.L.R. 624;

Tseriotis v. *Municipality of Nicosia* (1968) 3 C.L.R. 218 at pp. 222-223.

Recourse.

Recourse against the decision of the respondent to promote

the interested party to the post of Technical Assistant Grade B in preference and instead of the applicant.

Ch. Pourghourides, for the applicant.

St. McBride, for the respondent.

Cur. adv. vult.

A. LOIZOU J. read the following judgment. By the present recourse the applicant seeks the annulment of the appointment of Panikos Panayiotou (hereinafter to be referred to as "the interested party"), to the post of Technical Assistant Grade 'B'.

On behalf of the respondent Board an objection has been raised that the matters complained of are within the domain of Private and not of Public Law, and that in the engagement of its staff and on matters incidental thereto, it does not exercise executive or administrative authority, hence the sub judice decision could not be the subject of a recourse under Article 146 of the Constitution.

The answer to this objection can be found in the case of *Potamitis* v. *Water Board of Limassol* (1983) 3 C.L.R. p. 1121 where Demetriades, J., at pp. 1127–1128, had this to say:

> "As I have said earlier, the respondents are a body established under Cap. 350 which entrusts it with the duties and powers of the control and management of the water supplies in the municipal area of the town of Limassol. It is, therefore, a body corporate which has been created for rendering services to the public and their relation with and their actions relating to their employees come within the domain of public law, like those of any other public utility corporation rendering services to the public. Any decision, therefore, of the respondents relating to their employees, is, in my view, of an executory or administrative nature and, therefore, can be made the subject of a recourse before this Court under Article 146.1 of the Constitution of the Republic".

I fully share this view and the said objection cannot stand. The fact that the employees of Water Boards are not included in the definition of Public Service in Article 122 of the Constitution does not affect the position.

The second objection raised on behalf of the respondent Board

is that the applicant has no legitimate interest inasmuch as he did not possess the required qualifications under the relevant scheme of service. It appears, however, that under the existing scheme of service and under the collective agreement entered into between the respondent Board and the Trade Unions representing its employees, there exists an undertaking by the respondent Board that in filling any vacant post it will give priority to persons already in its service, provided that such employees satisfy the requirements of the Board, which can be the only competent body to decide on the matter. It is apparent, that as a result of this provision the respondent Board did ultimately consider the applicant as eligible for promotion as it appears from an affidavit sworn by its Manager to which, however, further reference will be made in due course. The existence of the said collective agreement and its relevant terms which were quoted in the written address of counsel for the applicant that persons that do not possess the qualifications required by the scheme of service for any particular post, may be considered for promotion, are expressly admitted in the aforementioned affidavit.

This ground therefore of absence of a legitimate interest must also fail as the respondent Board has itself treated the said collective agreement as adding to and supplementing the relevant scheme of service, in respect of candidates who are already in its service.

Having first disposed of these preliminary legal points which go to the jurisdiction of the Court and as such, ought to have been so dealt, I turn now to the facts of the case.

The vacancy in the aforesaid post was advertised in the newspapers and applications were invited to be submitted by the candidates on or before the 19th May, 1982, and the applicant and the interested party, who was not in the service of the respondent Board, were among those who applied for the post. The respondent Board at its meeting of the 10th June, 1982, decided not to fill the said vacant post and informed the applicant by letter dated the 11th June, 1982, accordingly, adding in the said letter that the post would be advertised again when the new schemes of service for the employees of the Board would be prepared.

The respondent Board then at its meeting of the 14th October 1982, decided to engage such a Technical Assistant on contract. He should, however, possess the qualifications of a graduate of the Higher Technical Institute or equivalent qualification in the field of Civil Engineering and its remuneration would be at scale A.4, plus three increments.

On the 26th November 1982, the said post was advertised once more in the daily press and it was provided therein that the candidates should be graduates of the Higher Technical Institute or other equivalent school in the field of Civil Engineering. The last date for the submission of applications was the 10th December, 1982.

At the next meeting of the respondent Board of the 16th December 1982, (see document 7 of the bundle filed on behalf of the respondent Board), it was recorded that there had been received 26 applications for the post of Technical Assistant (on contract) which was advertised.

The minutes of the meeting of the 12th January 1983, of a Selection sub-Committee set up for the purpose which took place at the office of the respondent Board appear in document 14 of the aforementioned bundle of documents. It is recorded therein that seventeen out of the twenty-six applicants were invited for interview and there attended only fifteen. It is also recorded that the Committee called each one of them separately and that at the end of the interviews it found Panayiotis Panayiotou (the interested party) as the most suitable for the post, that he made the best impression at the interview, he concentrated the required qualifications, he had personality, he answered correctly the question put to him and he had previous experience, and it decided unanimously to recommend to the Board his appointment. The minutes of the respondent Board of its meeting of the 1st February 1983, read as follows:

"2. Decisions of the previous meeting and matters arising therefrom.

2.1 The Board approved the decision of the Selection Committee for Technical Assistant Grade "B" for the employment of Panayiotis Panayiotou and approved the Minutes circulated, dated 15th January, 1983".

In execution of the said decision a contract of employment (Document 16) was signed on the 11th Feburary, 1983, between the interested party and the respondent Board for a duration of one year starting on the 14th January 1983, and ending the 13th January 1984.

The next meeting of the respondent Board took place on the 3rd March 1983, and deals with the leave to which the interested party would be entitled. At its meeting of the 29th July 1983, the following is recorded:-

"Technical Assistant 6.3 At the vacant post of Technical Assistant Mr. Panikos Panayiotou who works already for the Board appointed on contract during the last six months is appointed".

The applicant came to know of this decision on the 12th September 1983, and on the 10th October 1983, he filed the present recourse.

What transpired at the aforesaid last meeting at which the permanent appointment of the interested party to the post of Technical Assistant Grade "B" was decided, has not been recorded, apart from the aforesaid brief minutes.

On behalf of the respondent Board, however, an affidavit was filed and in paragraph 14 thereof the following is stated

"14. I positively assert and declare upon my oath that at that meeting on 29.7.1983:-

(a) The applicant himself was in fact duly considered.

(b) His qualifications were fully considered.

(c) The collective agreement which required the Board to consider persons for promotion despite any lack of qualifications was considered.

(d) In fact all the seven foremen were considered as well as all the employees in the technical department.

(e) Only those qualifications under the existing Scheme of Service for Technical Assistants were considered and only those.

(f) The qualifications required of the person to fill the Contractual Post were not taken into account in any way whatsoever when considering the suitability of the applicant for promotion to the vacant post of Technical Assistant.

(g) The ability of the applicant and his lack of qualifications as mentioned by me in paragraph 10 hereinabove under the existing Scheme of Service were fully considered. The applicant was in no way measured against the standard qualifications for the advertised contractual post.

(h) The possibility of advertising the post was considered when the Board found that they were unable in the exercise of their discretion to appoint any of the foremen or technical staff to the vacant post and would have to look elsewhere than amongst their permanent employees.

(i) The Board decided not to advertise but would offer Mr. Panayiotou the post as he had the necessary qualifications and had shown every satisfaction to that date whilst under contract".

This situation raises a serious problem as to whether evidence can be adduced to supplement the minutes of the administrative collective organ concerned. In that respect reference may be made to the case of *Costas Christou* v. *The Republic* (1969) 3 C.L.R. 134, in which the cases of *Cleanthis Georghiades* v. *The Republic* (1965) 3 C.L.R. 473 and *Arkatitis and others (No. 1)* v. *The Republic* (1967) 3 C.L.R. 29 were reviewed and distinguished. On this point Vassiliades P., in his judgment had this to say at p. 148:

"I shall now proceed to deal, shortly, with the other point taken in this appeal regarding the evidence of Mr. Protestos in this recourse. He was called to explain from the witness-box his vote in the making of the Commission's decision the minutes of which were already before the trial Judge. Counsel for the Appellant objected to such evidence on the basis of the two cases cited by him: *Georghiades (No. 2)* v. *The Republic* (1965) 3 C.L.R. 473 and *Arkatitis*

and *Others* (*No.* 1) *v. The Republic* (1967) 3 C.L.R. 29. The learned trial Judge ruled that statements appearing in the judgments in those two cases, afforded good ground for receiving the evidence of Mr. Protestos. During the hearing of the appeal before us, learned counsel for the respondent drew attention to the inquisitorial nature of Court proceedings under a recourse and to the rules regulating such proceedings (Rules of the Supreme Constitutional Court, 1962) which give wide power to the Court to receive evidence on any point or matter which the Court might consider necessary for the proper determination of the recourse.

Learned counsel pointed out that, unlike ordinary proceedings between party and party where the Court decides the case on the material placed before it by the parties, according to the rules of procedure and the law of evidence, proceedings under a recourse are of a public nature where the function of a Court is to investigate into the matter and decide the question before it upon such evidence as the Court might consider necessary for the purpose.

I find myself in agreement with this submission of learned counsel for the Commission to the effect that the nature of the proceedings in a recourse are such as to give the Court much wider latitude in receiving evidence material for the determination of the issue before it. But, in the exercise of such power, experience has led to the development of rules which will guide the Court in receiving such evidence. One of such rules is that in dealing with documentary evidence and particularly correspondence or minutes leading to the executive act or decision under consideration, the Court will take the position from the document before it which the Court will, if necessary, construe or interpret; and will not admit evidence to explain or interpret the contents of the document. The construction and interpretation of the document is a matter for the Court; and oral evidence in that connection, is more likely to complicate rather than clarify the issue. It is only in exceptional circumstances that oral evidence will be required to 'complete the picture' presented by the document; and it is for the Court to decide whether in the particular case before

it, such evidence is necessary or not. The two cases referred to are, in my opinion, distinguishable on their facts; and do not, I think, support the contention that the oral evidence of Mr. Protestos now found on the record, was necessary or should be received to explain his view of the matter before the Commission and the reasons for which he cast his vote as he did. The minutes should speak for the member; and not the member for the minutes".

Triantafyllides, J., dealt with the matter at p. 150 and said:

"In order to arrive at a conclusion regarding the true effect of the aforequoted statement of Mr. Protestos, the learned Judge of this Court, who tried the case, allowed Mr. Protestos to give evidence on oath on this point; contrary to an objection to such a course which was raised by counsel for the Appellant.

The two earlier cases—*Georghiades (No. 2) and The Republic* (1965) 3 C.L.R. 473 and *Arkatitis (No.1) and The Republic* (1967) 3 C.L.R. 29—which were relied upon as relevant precedents, by the trial Judge, in receiving the evidence of Mr. Protestos, are in my view clearly distinguishable from the present case, in view of the materially different circumstances in which evidence was allowed to be adduced during the hearing of such cases.

There is no doubt that the parties to revisional jurisdiction proceedings, under Article 146 of the Constitution, are at liberty to adduce proof in support of their contentions. But, it is absolutely clear, on the other hand, that the ultimate responsibility for, and control of, the reception of evidence in such proceedings, lies with the trial Judge, in the discharge of his inquisitorial function in relation to the validity of the administrative action, or omission which is sub judice before the Court.

A trial Judge has quite a wide discretion in this respect, but such discretion has to be exercised in a manner which is, inter alia, compatible with the paramount object of the existence of the revisional jurisdiction under Article 146, namely to ensure good administration; therefore, such discretion cannot be exercised in a manner which will be inconsistent with good administration.

I think it was contrary to the interests of good administration to permit—in the light of the circumstances of the present case—Mr. Protestos, a member of a collective organ, to give evidence regarding the nature of his views, which had already been officially recorded in the minutes of such organ.

This was not a case in which a member of a collective organ, in expressing his recorded in the minutes views, had made reference to matters not stated, too, in such minutes and as a result it became necessary to hear evidence regarding such matters; nor was there any allegation made that the views of Mr. Protestos had been incorrectly recorded.

I have had, really, no difficulty in coming to the conclusion that the evidence given by Mr. Protestos in this case, regarding what he stated at the relevant meeting of the Public Service Commission, was not properly receivable".

Loizou, J., at p. 152 said:

"I also agree that the appeal should be allowed. In my view it is sufficient, for the purposes of this case, to say that the evidence of Mr. Protestos was wrongly received and that the two cases on which the learned Judge relied in receiving such evidence i.e. *Georghiades (No. 2) and The Republic* (1965) 3 C.L.R. 473 and *Arkatitis (No. 1) and The Republic* (1967) 3 C.L.R. 29, are clearly distinguishable from the present case.

The statement of this witness at the meeting of the Commission at which the decision challenged by this recourse was taken, which appears in the extract from the minutes of that meeting (exhibit 1) seems to be perfectly clear and unambiguous".

Hadjianastassiou, J., deals with the matter as follows at pp. 156–157:

"The learned trial Judge then proceeded to hear the evidence of Mr. Protestos and, in his judgment, after dealing with the authorities cited, had this to say about the issue of the reception of evidence:–

'In my judgment, no valid distinction as regards admis-

sibility can be drawn between the matter objected to in the latter case and Mr. Protestos's evidence as to what he had in fact said at the Commission's meeting of February 8 last and accordingly that case provides a precedent for the admission of Mr. Protestos's evidence.

It follows that I must proceed to consider the effect, if any, of that evidence. And first, is it acceptable? It has not been disputed; minutes of a meeting do not necessarily convey accurately what actually passed at the meeting; and the evidence is both inherently credible and consistent with the minutes. Accordingly, I accept it as true.'

I would like to begin by saying that, with due respect to the learned trial Judge's opinion, I hold a different view because a judgment must be read in the light of the facts of the case in which it is delivered. Having had the advantage of reading the decision in those two cases, and particularly *Arkatitis*' case, I have reached the view that the facts of those cases are distinguishable from the facts of the present case, and should not have been followed by the trial Court. Furthermore, I would like to add that, in my opinion, as the statement of Mr. Protestos in the minutes appears to be clear and unambiguous, I would, therefore, accept the submission of counsel that the evidence was wrongly received.

There is no doubt that it is within the province of the Court to construe the document in question, and the fundamental rule of interpretation is that if the words of a document are in themselves precise and unambiguous, no more is necessary than to expound those words in their natural and ordinary sense, the words themselves in such case best declaring the intention of the writer. In my view, therefore, it would have been a very dangerous practice indeed to allow evidence to explain or add to what was said long after the meeting was over. In my opinion, in view of the fact that the words were clear and unambiguous and that this was not a case in which it was necessary to complete the picture of such action or decision of the Commission, the Court was

not entitled, in the particular facts of this case, to receive this evidence."

No doubt the principle to be discerned from the aforesaid statements of the Law is that it is very dangerous to allow evidence to explain or clarify and afortiori to add to the relevant records of the proceedings that the administration thought fit to make. Reception of such evidence would be detrimental to the interest of good administration. The Judge exercising revisional jurisdiction must exercise his wide discretionary powers to allow or not such evidence with the utmost caution, and always bearing in mind that due reasoning containing clear and adequate reasons should be given in order to enable the Court to ascertain whether or not a decision is well founded in fact and in law. Especially regarding decisions taken by collective organs which are unfavourable to the subject. This of course subject always to the principle that the reasoning of an administrative decision may appear in the file of the case and it is not necessary that every material factor taken into consideration should be specifically mentioned in the decision itself, sufficient being the existence of material in the file showing that the sub judice decision is a duly reasoned one taken after a proper in the circumstances inquiry.

In the circumstances of this case I am of the view that I cannot allow the addition to the minutes of the respondent Board at which the sub judice decision was taken, by relying on the aforementioned contents, of the affidavit sworn by its Manager. If I were to do so this would amount to add reasoning to the sub judice decision which is completely devoid of any reasoning whatsoever. Nor there being any reasoning in relation to such decision to be derived at all from any record related thereto. In fact none has been produced before me. (See *Papaleontiou v. The Republic* (1967) 3 C.L.R. 624).

Moreover an appropriate statement of the Law is to be found in the case of *Vassos Tseriotis v. Municipality of Nicosia* (1968) 3 C.L.R. 218, where at pp. 222-223 Triantafyllides J., as he then was had this to say:

"The need for due reasoning of decisions of collective organs has been more than once stressed by this Court (see *PEO and The Board of Cinematograph Films Censors,* (1965) 3

C.L.R. 27; *Constantinides and The Republic,* (1967) 3 C.L.R. 7; *Kasapis and The Council for Registration of Architects,* (1967) 3 C.L.R. 270). Such need was even more great in the present case, in view of the already stated circumstances in which the Interested Party, a newcomer to the Markets' Service, was appointed over the head of the Applicant to the newly-created senior post in that Service, when until then there was no higher post than that held by the Applicant in such Service.

Actually, an attempt has been made to disclose the reasoning for the sub judice decision by means of evidence given by the Chairman of the Municipal Commission, Dr. Ioannides, at the hearing of the case before the Court. It is correct that, exceptionally, the reasoning for an administrative decision may be disclosed belatedly, but this can only be accepted when there exist relevant records from which such reasoning can be clearly derived (see Stasinopoulos on the Law of Administrative Disputes (1964) p. 228); and this is not so in the present instance; no such records appear to exist;"

Considering the facts of the present case and guided by the aforesaid general principles of Administrative Law which I have attempted to sum up, I have come to the conclusion that the sub judice decision should be annulled on the ground of lack of due reasoning, as to my mind belated disclosures of same can only be allowed when there exist the relevant records from which due reasoning can be clearly derived.

The recourse therefore succeeds but in the circumstances there will be no order as to costs.

Sub judice decision annulled. No order as to costs.