

1986 September 24

[PIKIS, J.]

IN THE MATTER OF ARTICLE 146
OF THE CONSTITUTION

AGNI HADJIDEMETRIOU,

Applicant,

v.

CYPRUS TOURISM ORGANIZATION,

*Respondents.**(Case No. 295/84).*

-
- Cyprus Tourism Organization—Promotion—Criteria of—Same as those adopted for the public service—Seniority—Previous service in the tourist department of the Ministry of Commerce and Industry—Not counted for purposes of seniority—Seniority of two years—Not of an overwhelming nature.* 5
- Cyprus Tourism Organization—Promotions— Selection Committee—Director-General of the Ministry of Commerce and Industry—Entitled to participate in the Committee and vote—Section 5(6) of the Cyprus Tourism Organization Law as amended by Law 48/78—Power to appoint—Includes power to promote.* 10
- Cyprus Tourism Organization—Promotions—Scheme of Service—Promulgation in the Official Gazette—Not a prerequisite of its validity—Effect of Law 48/86—Prospective.* 15
- Collective organs— Statutory bodies— Composition of—Must conform to the pattern approved by Law.*
- Constitutional Law—Public Service Commission—Constitution, Article 122—Law of necessity justifies setting up in particular areas of the public service of substitute bodies to perform its function—Such bodies, however, should have the same attributes, particularly as to independence vis-a-* 20

vis the executive, with the body they replaced—Cyprus
 Tourism Organization—Section 5(3) of the Law providing
 that members of the board of said organization may be
 removed by Council of Ministers, whilst under the Con-
 5 stitution the members of the said Commission could only
 be removed “on the like grounds and the like manner as
 Judges of the High Court” (Article 124.5)—Said section
 unconstitutional—Section 8(b) of the same law—It equally
 undermines the independence of the substitute body and
 10 runs counter to Article 125.1 of the Constitution.

The applicant impugns the promotion of the interested
 party to the post of Senior Assistant Tourist Officer “A”
 The several issues calling for consideration in this case
 are: (a) Whether the composition of the selection Com-
 15 mittee that made the appointment was defective by reason
 of the inclusion in its membership of the Director-General
 and whether it exceeded its powers by making a promo-
 tion, whereas its competence was limited to appointments,
 (b) Whether in making the sub judice promotion the
 20 Committee acted in abuse or excess of power and whether
 the Committee could apply a scheme of service that had
 not been published in the Official Gazette, and (c) The
 unconstitutionality of the body entrusted with competence
 to make appointments in the respondent Organization
 25 forming part of the “public service” in the sense of Article
 122 of the Constitution.

Held, annulling the sub judice decision: (1) Both on
 grammar and on authority the power to appoint em-
 braces the power to promote. Statutory bodies being the
 30 creature of Statute must conform in their composition
 to the pattern approved by law. Section 5(5) of the Cyprus
 Tourism Organization Law provides for the attendance of
 the Director-General before the Board without a right to
 vote. The applicant submitted that by analogy his partici-
 35 pation in any body to which powers of the Board were de-
 legated should be construed as limited to attendance and
 expression of opinion. The submission runs counter to the
 plain provisions of s. 5(6) of the Law, as amended
 by Law 48/78. Consequently, the submission that the
 40 Committee was ill-constituted cannot be upheld.

(2) The promulgation of a scheme of service in the

official Gazette is not a prerequisite of its validity. The effect of Law 48/86 is prospective and does not change the position in this case. The applicant is senior to the interested party by about two years, but though the overall rating of the candidates was the same (very good) the interested party had a slight edge over the applicant. Neither in the law nor in the regulations is there anything to suggest that the service anywhere outside the respondent corporation counts for purposes of seniority. Consequently, applicant's previous service in the Tourist Department of the Ministry of Commerce and Industry cannot be added to her years of service in the corporation. The seniority of the applicant, substantial though it was, was not overwhelming. In the circumstances the selection of the interested party was reasonably open to the respondents.

(3) The constitutionality of the body entrusted by law to make appointments is challenged on two grounds, namely legislative usurpation of the powers vested in the Public Service Commission and lack of the attributes of independence of the said Commission that should be possessed by every body established in substitution of the Public Service Commission. Our case law establishes that the tumultuous events which struck Cyprus justified in the name of necessity created thereby the setting up in particular area of the public service of substitute bodies to perform the duties of the Public Service Commission.

As regards the second ground, the case law, to the extent it illuminates the point, suggest that such substitute bodies should have the same attributes as the body they replaced; particularly they should enjoy independence vis-a-vis the Executive. This is reinforced by the separation envisaged in the Constitution between political and civil authority. There was no necessity and none has arisen to invest the substitute bodies with attributes other than those envisaged by the Constitution for the members of the Public Service Commission.

The Constitution (Article 124.5) provides that the members of the said Commission once appointed cannot be removed except "..... on the like grounds and the

like manner as Judges of the High Court," whereas under the law (section 5(3)) the members of the Board of the respondent organisation may be dismissed at any time by the Council of Ministers. The same lack of independence affects the Selection Committee. Moreover, the power of the Minister in virtue of section 8(b) of the Law to issue binding directives respecting appointments and promotions undermines also the independence of the body and is in direct opposition to Article 125 of the Constitution making such matters the sole province of the independent authority charged with competence in respect of them. It follows that sections 5(3) and 8(b) of the law are inconsistent with Articles 124.5 and 125.1 of the Constitution.

15 *Sub judice decision annulled.*
No order as to costs.

Cases referred to:

- Theodorides v. Ploussiou* (1976) 3 C.L.R. 319;
Ishin v. The Republic, 2 R.S.C.C. 16;
 20 *Vakis v. The Republic* (1984) 3 C.L.R. 952;
Kalouris v. The Republic, 1964 C.L.R. 313;
Gavriel v. The Republic (1967) 3 C.L.R. 637;
Kyprianou v. The Republic (1976) 3 C.L.R. 210;
Iossif v. C.Y.T.A. (1970) 3 C.L.R. 225;
 25 *Mesaritou v. C.B.C.* (1972) 3 C.L.R. 100;
HadjiGeorghiou v. C.T.O. (1986) 3 C.L.R. 1110;
Ibrahim v. The Republic, 1964 C.L.R. 195;
Republic v. Louca and Others (1984) 3 C.L.R. 241;
Makrides and Another v. The Republic (1984) 3 C.L.R. 677;
 30 *Frangoullides v. The Republic* (1966) 3 C.L.R. 676;
Aloupas v. National Bank of Greece (1983) 1 C.L.R. 55.

Recourse.

Recourse against the decision of the respondents to promote the interested party to the post of Senior Assistant Tourist Officer A in preference and instead of the applicant.

5

A. S. Angelides, for the applicant.

A. Dikigoropoulos, for the respondents.

N. Charalambous, Senior Counsel of the Republic, on behalf of the Attorney-General, heard on the question of constitutionality.

10

Cur. adv. vult.

PIKIS J. read the following judgment. The several issues calling for consideration in these proceedings are:-

- (a) The legality of the constitution of the Selection Committee that made the appointment; it is suggested its composition was defective because of the inclusion in its membership of the Director-General. Ancillary to this is the contention that the Selection Committee assumed powers beyond those given it by law, namely, it assumed power to promote employees of the respondents whereas its competence was limited to appointments. The latter submission will not be gone into further for both as a matter of grammar and on authority(1) power to appoint embraces power to promote.
- (b) The exercise of the powers of the respondents relevant to the promotion of the interested party to the post of Senior Assistant Tourist Officer 'A'. The applicant, a contestant for the post, claims that the decision was defective for abuse or excess of power. Also

15

20

25

30

(1) *Theodorides v. Ploussiou* (1976) 3 C.L.R. 319.

it is suggested respondents exceeded their authority by applying schemes of service that were invalid for lack of promulgation in the Gazette; a submission that cannot be upheld in view of our caselaw establishing that publication of schemes of service, desirable though it is, is not a prerequisite for their validity⁽¹⁾. Recent statutory changes making publication of schemes of service necessary for their enforcement (Law 48/86) have prospective effect and leave the position, as far as this case is concerned, unaffected.

(c) Unconstitutionality of the body entrusted with competence to make appointments in the Cyprus Tourism Organization forming part of the "public service", in accordance with Article 122 of the Constitution. The submission is that power to make such appointments vested in the Public Service Commission or in a body set up as a substitute for it having the same or similar attributes.

A. *Legality of the constitution of the Selection Committee*

A legal body being the creature of statute must be constituted in accordance with the formalities laid down in the law. Failure to observe legislative directives governing the composition of the body makes its existence unnoticeable in law and renders it invalid⁽²⁾.

Statutory bodies being the creatures of statute must conform in their composition to the pattern approved by law as a condition precedent to the valid assumptions of the powers vested in them by law. A statutory body constituted otherwise than the law provides, operates in the vacuum of its inexistence.

Applicant contends the constitution of the Selection Committee that assumed the powers of appointment given

⁽¹⁾ *Ilter Ishin v. The Republic*, 2 RSCC 16, at p. 20; *Vakis v. The Republic* (1984) 3 C.L.R. 952.

⁽²⁾ See Conclusions from Caselaw of the Greek Council of State 1925-1929, 107-110; Kyriacopoulos—Greek Administrative Law 1977, Vol. A. 214; *Michael Kalouris v. The Republic*, 1964 C.L.R. 313; *Gavriel v. Republic* (1967) 3 C.L.R. 637, 647; *Pantelis Kyrianiou v. Republic* (1976) 3 C.L.R. 210.

to the respondents was defective for inclusion in its membership of the Director-General. The submission is founded on the provisions of s. 5(5) that confines the power of the Director-General to attendance before the Board without a right to vote. By analogy, the power of the Director to take part in the deliberations of any body to which powers of the Board are delegated should likewise be construed as limited to attendance and expression of views. The submission runs counter to the plain provisions of s. 5(6) of the law (as amended by Law 48/78) that expressly empowers the Board to delegate powers vested in it by the law to a sub committee composed of members of the Board as well as the Director-General. Hence we cannot read the limitation suggested by applicant as implicit in the law in view of clear provisions to the contrary. Consequently, the submission that the Selection Committee (to which power to make appointments and promotions was delegated by a decision of the Board dated 8th July, 1983) was ill-constituted cannot be upheld.

B. The validity of the decision to promote the interested party—Comparative merits of the candidates.

The applicant and the interested party joined the respondent corporation in 1971 (5.1.1971) appointed Information Superintendents, the applicant on a permanent and the interested party on a temporary capacity, to which she was confirmed some two years later (1.10.1972). Before joining the respondent corporation applicant served in the Tourist Section of the Ministry of Commerce and Industry wherefrom she resigned coincidentally with the assumption of her new duties. The post held by the parties was renamed in the year 1979 and given its present title.

In accordance with the Regulations⁽¹⁾, the criteria for promotion of personnel are the same as those adopted for the public service, namely, merit, qualifications and seniority. The Selection Committee had before it the material bearing on the performance of the candidates in-

⁽¹⁾ See Part III of the Gazette, Notification 829-1970 Regulation 15 - 1970.

cluding their confidential reports. Though the overall rating of the two candidates was the same ("Very Good"), the interested party had a slight edge over the applicant as it emerges upon consideration of individual ratings embodied in the confidential reports (See confidential reports 1980 - 1983). Qualificationwise they were also in an approximately comparable position; where there was noticeable difference between them was seniority. Applicant was senior to the interested party by about two years as earlier indicated. Neither in the law nor in the Regulations is there anything to suggest that service anywhere outside the corporation counted for purposes of seniority; consequently, applicant's previous service in the Tourist Department of the Ministry, considerable it must be said, commencing in 1953, could not be added up to her years of service in the corporation. That being the case, the seniority of the applicant to the interested party, substantial though it was, was not overwhelming as it would otherwise be had her previous service counted.

Faced with the above picture, it was reasonably open to the respondents to select the interested party. There is nothing before me to suggest that in so doing they took into consideration anything other than material properly bearing on the merits (in the wider sense) of the parties or that they attached to their relevant qualifications anything other than the importance attached to them by law.

C. *Constitutionality.*

The statutory body entrusted by the law with competence to make appointments in the Cyprus Tourism Organization, namely, the Board of Directors or a body to which this power could be delegated, that is, the Selection Committee, is challenged as unconstitutional on two grounds:

(a) legislative usurpation of the powers vested by the Constitution in the Public Service Commission, and

(b) lack of the attributes of independence of the Public Service Commission that should be possessed by every body

established in substitution of the Public Service Commission.

The amenity of the Council of Ministers to dismiss members of the Board at any time provided for in s. 5(3) of the law, defies the constitutional framework of independence of the members of the Body entrusted with competence to make appointments in the public service. Para. 5 of Article 124 makes members of the Public Service Commission irremovable during their term of office, except "on the like grounds and in the like manner as a Judge of the High Court". The independence of members of the Board of the respondent corporation is also imperilled, according to arguments of counsel for the applicant, by the sweeping powers vested in the Minister (s.8(b)) to issue binding directives to the Board in every area of their competence.

I shall not in this case advert to the merits of the submission that nobody other than the Public Service Commission could assume powers to make appointments in the public service as defined in Article 122 of the Constitution. Because our caselaw clearly establishes that the necessity created by the tumultuous events that struck Cyprus soon after its independence justified in the name of the necessity created thereby the setting up in particular areas of the public service of substitute bodies to perform the duties of the Public Service Commission⁽¹⁾. The ground being thus covered by authority, I shall not debate certain reservations I have with regard to the inevitability of this approach under the principles evolved in the case of *Ibrahim v. The Republic*⁽²⁾. Therefore, I shall confine discussion of the issue of constitutionality to the second ground specified above. The attributes of a body established under the doctrine of necessity to substitute for the Public Service Com-

(1) See, inter alia, Ioannis Iosif v. C.Y.T.A. (1970) 3 C.L.R. 225, Mesaritou v. C.B.C. (1972) 3 C.L.R. 100; Theodorides v. Ploussiou (1978) 3 C.L.R. 319; Krinos HadjiGeorghiou v C.T.O. (1986) 3 C.L.R. 1110.

(2) 1964 C.L.R. 195

mission have not been the subject of authoritative declaration by the Full Bench of the Supreme Court in any decided case. Dicta, on the other hand, of the Full Bench in *Republic v. Louca and Others*(1) suggest that such bodies should have the same attributes of independence as those envisaged by the Constitution with respect to the Public Service Commission under Part VII of the Constitution. The majority of the members of the Supreme Court drew attention to the provisions of s. 4(3) of the Public Service Law—33/67—and invited the legislature to consider afresh its compatibility with the relevant provisions of the Constitution governing security of tenure of members of the Public Service Commission. In a minority judgment I attacked the problem directly and expressed the opinion, feeling it was necessary for the just determination of the matter before the Court, that the Public Service Commission established under Law 33/67 being a body evolved as a substitute for the Public Service Commission under the Constitution, should have the same attributes of independence as the body it replaced. In *Makrides and Another v. The Republic* (first instance judgment) (2), I was equally specific pointing out that no decided case supports the contrary view. The caselaw as it appears to me, to the extent it illuminates the question, suggests that bodies charged with the competence formerly vested in the Public Service Commission under the Constitution should have, notwithstanding changes in their composition, the same attributes as the body they replaced; particularly they should enjoy the same independence vis-a-vis the Executive. That this should be so, is reinforced by the separation envisaged in the Constitution between political and civil authority(3).

As often stressed the doctrine of necessity is intended to underpin constitutional order in areas where it is threatened with collapse(4). Whereas provision for replacement of the Public Service Commission became necessary with the departure of Turkish members of the body, there was

(1) (1984) 3 C.L.R. 241.

(2) (1984) 3 C.L.R. 677.

(3) *Charilaos Frangoulides v. The Republic* (1966) 3 C.L.R. 676.

(4) *Aloupas v. National Bank of Greece* (1983) 1 C.L.R. 55.

no necessity and none has arisen to invest the substitute bodies with attributes other than those that the constitutional legislator intended for members of the body charged with the duty of manning the public service and no suggestion has been made to that end.

5

The vital element of independence provided for by the Constitution with regard to members of the Public Service Commission was their security of tenure. Once appointed they should not be liable to be removed except "... on the like grounds and the like manner as Judges of the High Court"⁽¹⁾ (See Part X of the Constitution respecting security of tenure of members of the High Court and matters relevant to their retirement and dismissal). The retirement and dismissal of members of the Public Service Commission was subject to the jurisdiction of the Council envisaged by Article 153.8 permitted only on grounds of mental or physical incapacity or infirmity in the case of retirement and misconduct in the case of dismissal. The object was to ensure their complete independence from political authority.

10

15

20

The Board of the Cyprus Tourism Organization was entrusted with power to make appointments and promotions of personnel in the organization, a branch of the public service, in accordance with the definition of "public service" in Article 122 of the Constitution. Its members should enjoy security of tenure in the manner ordained by the Constitution. And they did not. In reality they held office at the pleasure of the Council of Ministers. The same lack of independence affected the Selection Committee, assuming it was constitutionally possible for a body set up to replace the Public Service Commission to delegate its competence with regard to personnel wholly or in part to another body.

25

30

The independence of the body was equally undermined by the power of the Minister of Commerce and Industry to issue binding directives respecting, inter alia, appointments and promotion in the organization in direct opposi-

35

⁽¹⁾ Article 124.5.

tion to the provisions of Article 125 making appointments and promotions the sole province of the independent authority charged with competence to make appointments in the public service.

- 5 Consequently the provisions of s. 5(3) and s. 8(b) of the law are unconstitutional. They are in conflict with Article 124.5 of the Constitution and are inconsistent with the provisions of Article 125.1 that vests in the body responsible for appointments in the public service sole res-
10 ponsibility for the exercise of the competence to the exclusion of everybody else.

In the result the sub judice decision is, pursuant to the provisions of Article 146.4(a), declared in the whole to be null and void.

15

*Sub judice decision
annulled.*