

1986 March 26

[Pikis, J.]

IN THE MATTER OF ARTICLE 146
OF THE CONSTITUTION

MICHAEL PANAYIOTIDES,

Applicant.

v.

THE REPUBLIC OF CYPRUS, THROUGH
THE PUBLIC SERVICE COMMISSION,

Respondent.

(Case No. 519/83).

Public Officers—Promotions—Seniority—Misconception of fact relating to applicant's seniority—Material—One of the interested parties was promoted as being the most senior of the candidates—In fact the most senior of them was the
5 *applicant—Revocation of the promotion of the said interested party—In the circumstances such revocation did not save the promotion of the other two interested parties.*

10 *Constitutionality of Statutes—Resolution of such issue is not undertaken unless unavoidable for the determination of the judicial cause or matter.*

The Public Service Law 33/67—Section 4(5)—The issue of its constitutionality (Article 124.6(2) of the Constitution) left open.

15 The respondents promoted interested party Ketonis to the post in question making express reference to his seniority over all other candidates competing for the post. As a matter of fact the most senior of the candidates was the applicant. The respondents sought to remedy the situation by revoking the promotion of the said interested party.
20 The question immediately arising is whether the sub judice decision can be saved by the revocatory act.

It should be noted that the promotion of the other two interested parties is also challenged on two other grounds, the first relating to the comparative merits of the parties and the second raising the issue of constitutionality of s. 4(5) of Law 33/67.

Held, annulling the sub judge decision: (1) The answer to the above question depends on whether the misconception relating to applicant's seniority merely affected the decision to promote Mr. Ketonis or the other two interested parties as well.

(2) The significance of the misconception in this case lies in the error as to applicant's seniority. The pertinent question is whether the misconception was material: for only material misconceptions of fact justify the nullification of an act or decision.

(3) As seniority is one of the three considerations for the assessment of the suitability of a candidate for promotion, true appreciation of one's seniority is a significant consideration for his promotion. Had the confidential reports on the two remaining interested parties been overwhelmingly better than those of the applicant, seniority might not be treated as such a consequential factor. In this case it is a matter of speculation what the respondents would have done, had they made no error as to the applicant's seniority. The error in this case was material.

(4) In view of the above and as issues of constitutionality should not be judicially resolved, unless unavoidable for the determination of a judicial cause or matter the question of the constitutionality of s. 4(5) of Law 33/67 is left open.

*Sub judge decision annulled.
No order as to costs.*

Cases referred to:

Kyriakides v. The Council for Registration of Architects
(1965) 3 C.L.R. 617 and on appeal (1966) 3 C.L.R. 640.

Psaras v. Ministry of Commerce and Industry (1971) 3
C.L.R. 151.

Recourse.

5 Recourse against the decision to promote the interested parties to the post of Registrar (Orthopaedics) in the Department of Medical and Health Services in preference and instead of the applicant.

G. Triantafyllides, for the applicant.

10 *N. Charalambous*, Senior Counsel of the Republic, for the respondent.

A. S. Angelides, for interested party L. Loizou.

Cur. adv. vult.

15 PIKIS, J. read the following judgment. Counsel for the respondents acknowledged in the course of the hearing that the sub judice decision is fraught with a factual misconception respecting the seniority of the parties. At his request the proceedings were adjourned with a view to affording him an opportunity to look into the matter and decide on the remedial steps warranted in the circumstances.

20 The misconception, evident from the minutes of the proceedings, arises from the fact that they regarded interested party Ketonis as the most senior of the candidates competing for promotion and in fact justified, inter alia, his promotion by express reference to that consideration: while

25 in point of fact the applicant was the most senior of the candidates. The reasoning of the decision suggests respondents misconceived the facts relevant to the seniority of the applicant; to what extent they misconceived them is not disclosed in the decision or the minutes explanatory thereto.

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35 On the advice of counsel for the Republic the respondents sought to remedy the situation by revoking the promotion of Ketonis; the question immediately arising is whether the decision could be saved by the revocatory act of the respondents. The answer will, no doubt, depend on whether the misconception of the facts relevant to the seniority of

the applicant merely affected the decision to promote Mr. Ketonis or the other two interested parties as well, namely, Mr. Loizou and Mr. Tourvas. The promotion of the interested parties is also challenged on two other grounds: The first relates to the comparative merits of the parties and the second raises a question of constitutionality. The submission is that the composition of the Public Service Commission was defective because of the appointment of one of its members, namely, Mr. Papaxenophontos, before the lapse of six months from his retirement from the public service. It has been argued that s. 4(5) of the Public Service Law, 33/67, making possible the appointment of a civil servant as member of the Commission before the lapse of six months, is unconstitutional for breach of the provisions of Article 124.6 (2) of the Constitution that postulates such a time gap as an indispensable prerequisite for appointment.

Resolution of questions affecting the constitutionality of laws, not least because of their solemnity, is not judicially undertaken unless unavoidable for the due determination of a judicial cause or matter⁽¹⁾. Consequently, the question of constitutionality will not be examined or pondered unless it becomes necessary after due elimination of the other issues. Attention will thus be focused in the first place on the implications of the misconception by the respondents of the seniority of the applicant.

The decision to revoke only the appointment of Mr. Ketonis suggests that counsel for the respondents take the view that the misconception affected only the suitability of Mr. Ketonis for promotion: that I believe, is an erroneous view of the implications of the factual mistake of the respondents. The significance of the misconception for the purposes of determination of the present recourse lies in the error disclosed thereby as to applicant's seniority. It is manifest from the error that they did not conceive correctly the facts relevant to the seniority of the applicant. Had they done so, they would not have treated Mr. Ketonis

⁽¹⁾ Kyriakides v. The Council for Registration of Architects (1965) 3 C.L.R. 617, and on appeal (1966) 3 C.L.R. 640; Andreas K. Psaras v. Ministry of Commerce and Industry (1971) 3 C.L.R. 151, 160.

as the most senior of the candidates for promotion; nor can we discern the extent of their misconception. All we can infer is that they misconceived the facts relevant to his seniority and the pertinent question is whether the misconception was material; for only material misconceptions of fact justify the nullification of an act or decision.

Seniority is one of the three material considerations for the assessment of the suitability of a candidate for promotion, albeit the last of the three factors in order of importance⁽¹⁾. So, as a matter of law, true appreciation of one's seniority in the service is a significant consideration for his promotion. More so when seniority is, as in this case, substantial extending to five years, vis-a-vis interested parties Loizou and Tourvas. Furthermore, we do know from the reasoning of the respondents that they regarded substantial seniority as an important factor for the promotion to the post in question. In fact, one of the specific reasons for promoting Mr. Ketonis was his substantial seniority.

Now, had the confidential reports on interested parties Loizou and Tourvas been overwhelmingly better than those on the applicant, seniority might not be treated as such a consequential factor. But this was not the case. The confidential reports on the applicant were equal to those on Mr. Tourvas and marginally better than those on Mr. Loizou. It becomes a matter of speculation discerning what the P.S.C. would have done had they made no error respecting the seniority of the applicant. Inevitably their misconception of the facts relevant to the seniority of the applicant was material for the decision and for that reason the decision must be annulled. In so ruling I have not overlooked the impressive qualifications of Mr. Loizou or Mr. Tourvas. nor should this judgment be construed as suggesting that had the respondents properly conceived the facts, it would not be open to them to appoint the interested parties in preference to the applicant. They will have an unfettered discretion on the matter when they come to re-examine the filling of the post of Registrar (Orthopaedics).

⁽¹⁾ Section 44(2)—33/67.

In view of the conclusions reached above, it is unnecessary to examine the question of constitutionality of s. 4(5) of Law 33/67, particularly its compatibility with Article 124.6 (2) of the Constitution.

In the result, the sub judice decision is annulled. Let there be no order as to costs.

Sub judice decision annulled
No order as to costs.