

1987 June 11

([TRIANTAFYLIDIS P MALACHTOS SAVVIDES,
PIKIS, KOURRIS JJ])

THE REPUBLIC OF CYPRUS, THROUGH
1 THE MINISTER OF HEALTH,
2 THE PUBLIC SERVICE COMMISSION,

Appellants,

v

RENOS ARGYRIDES,

Respondent

(Revisional Jurisdiction Appeal No 678)

Public Officer — Promotions — Confidential reports — Circular 491/79 containing the regulations for the preparation of confidential reports — Reg 9 — Breach of, by the countersigning officer — Tantamounts to illegality

Constitutional Law — Equality — Constitution, Art 28 — Circular 491/79 containing the regulations governing preparation of confidential reports for public officers — Application of such regulations in a different manner in each particular case constitutes a violation of the principle of equality — Breach of Reg 9 by countersigning officer — Sub judice promotion annulled on this ground as well

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The promotion of the interested party in the recourse filed by the respondent in this appeal to the post of Senior Government Analyst was annulled by a Judge of this Court on the ground of infringement of Reg 9* of Circular 491/79, that is the circular containing the Regulations concerning preparation of confidential reports

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Indeed, it is common ground that there was a difference of opinion between the reporting and the countersigning officer concerning the evaluation of the two candidates for the said post in a number of confidential reports. In breach of the procedure set out in Reg 9, the countersigning officer proceeded to make his own assessments, some in ordinary and some in red ink, without having previously discussed the matter with the reporting officer and without giving reasons for his own assessments in the appropriate column

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* Quoted at p 1095 post

Held*, *dismissing the appeal* (1) Circular 491/79 replaced the General Orders concerning preparation of confidential reports, which had been enacted at a time, when Cyprus was a British colony and had continued to remain in force until so replaced in virtue of section 86(1) of the Public Service Law 33/67

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(2) Perusal of the case law concerning breach of the regulations for the preparation of confidential reports shows that the argument in all cases turned on the question whether the breach in question was a material irregularity or not

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(3) The regulations in question were made by the Council of Ministers and though they do not constitute subsidiary legislation in the strict sense, they have to be strictly complied with. Deviation by the countersigning officer from the express provisions of such regulations tantamounts to an illegality

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(4) Moreover, any application of the Regulations in a different manner in each particular case violates the principle that a person is entitled to equal treatment, which is safeguarded by Art 28 of the Constitution. It follows that the sub-judice decision must be annulled on this ground as well

Appeal dismissed No order as to costs

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Cases referred to

Georgiou v Republic (1976) 3 C L R 74,

Livadas v The Republic (1985) 3 C L R 506,

Themistocleous v The Republic (1985) 3 C L R 2652

Lofitis and Another v The Republic (1986) 3 C L R 1318,

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Chnstofides v The Republic (1985) 3 C L R 1127,

Hjilosif v CYTA (1986) 3 C L R 1353,

Avanis v CYTA (1985) 3 C L R 2695,

Karpasits v Republic (1986) 3 C L R 1617

* The judgment of the Court was delivered by Savvides J. Pits J delivered a separate judgment, ruling, in agreement with the judgment of Savvides, J., that breach of Reg 9 constitutes an illegal action and, furthermore, entails separate treatment of a member of a class of public officers contrary to Art 28 of the Constitution safeguarding equality before the law and the administration

Appeal.

Appeal against the judgment of a Judge of the Supreme Court of Cyprus (Demetriades, J.) given on the 25th October, 1986 (Revisional Jurisdiction Case No 342/83)* whereby the promotion of interested party to the post of Senior Government Analyst was annulled.

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N. Charalambous, Senior Counsel of the Republic with A. Vassiliades, for the appellant.

A.S. Angelides, for the respondent.

M. Papapetrou, for the interested party.

Cur. adv. vult. 10

TRIANTAFYLLIDES P.: The main judgment of the Court will be delivered by Mr. Justice Savvides.

SAVVIDES J.: This is an appeal by the respondents in Recourse No. 342/83, against the judgment of a Judge of this Court in the exercise of the original jurisdiction of the Court whereby he allowed the recourse of the applicant against the respondents and annulled the promotion of the interested party to the post of Senior Government Analyst.

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The respondents filed the present appeal challenging the decision of the learned trial Judge on the grounds that:-

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(a) The trial Judge wrongly interpreted the regulations concerning the preparation of confidential reports.

(b) The trial Judge wrongly concluded that the amendment by the countersigning officer of the confidential reports of the applicant and the interested party amounted to a material irregularity.

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(c) The trial Judge wrongly concluded that the respondent Commission in reaching the sub judice decision did not take into consideration the fact that one of the persons mentioned as referee in the application of the interested party was the Director of the Department.

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(d) The trial Judge wrongly found that the fact that the amendment of the annual confidential reports by the countersigning officer which were made by the Director who

* Reported in (1986) 3 C.L.R. 1488.

happened to be the referee of the interested party might have influenced the decision of the respondent Commission.

5 Counsel for the appellants and the interested party argued before us that the decision of the Public Service Commission was reasonably open to it and that any irregularity which was disclosed as a result of a different assessment of the parties in the confidential reports by the countersigning officer which was not in compliance with the regulations as contained in Circular No. 491/79 was an immaterial irregularity and could not affect the outcome
10 of the case.

Counsel for the respondent, on the other hand, advanced a two-legged argument in support of the decision of the trial Court that the sub judge promotion should be annulled.

15 The first leg was that the failure by the countersigning officer to comply with the regulations concerning the preparation of confidential reports and in particular regulation 9, as contained in Circular 491/79 taints the act with illegality leading to the vitiation of the sub judge decision which was based on it.

20 The second leg of his argument was that if the Court finds that the contravention of Regulation 9 does not amount to an illegality, it is in any event a material irregularity which should affect the outcome of the sub judge decision of the respondents.

Regulation 9 of Circular 491/79 provides as follows:

25 «Part V of type B should be filled by the Countersigning Officer after careful consideration of the assessments on each item by the Reporting Officer. If the Countersigning Officer disagrees on the assessment on any item by the Reporting officer, he discusses the matter with him and if the disagreement continues to exist, he gives his own assessment
30 in red ink and initials same, giving the reasons for his own assessment in the column for remarks».

It is common ground in this case that there was a difference of opinion between the reporting officer and the countersigning officer in the evaluation of the two candidates in a number of
35 confidential reports. The countersigning officer, instead of complying with the procedure set out in regulation 9, proceeded to make his own assessments some in ordinary ink, and some in red, on certain items, without previously having discussed the

matter with the reporting officer and without giving reasons for his own assessments in the appropriate column.

The provisions concerning annual confidential reports were previously contained in the General Orders which were in force during the Colonial rule when Cyprus was a British Colony and continued to remain so in force by virtue of section 86(1) of Law 33/67 till March, 1979, when they were repealed by the Council of Ministers, the organ to which the powers vested in the Governor were transferred, and were substituted by the new regulations which were embodied in Circular 491/79 which was communicated to all Government Departments by letter of the Director of the Department of Personnel of the Ministry of Finance.

As to the validity of the General Orders, useful reference may be made to the case of *Odysseas Georghiou v. Republic* (1976) 3 C.L.R. 74 in which Triantafyllides, P. in delivering the judgment of the Full Bench, had this to say at p. 82:-

«It has been argued during the hearing of this appeal that since the coming into operation of Law 33/67 the 'special confidential reports' have lost most of, if not all, their significance, as no express provision exists in Law 33/67 about such reports. We cannot accept this argument as being correct. As it appears from the General Orders (Appendix A. II/2.5(5)(b)) the 'special confidential reports' are indicative of particularly meritorious services and the relevant provision in the General Orders has been kept in force, as established practice, by means of section 86(1) of Law 33/67.»

The effects of non-compliance with regulation 9 and a similar regulation of Public Authorities came up for consideration before members of this Court in the exercise of its original jurisdiction in a number of cases since 1979 to most of which reference has been made by counsel on both sides in support of their respective arguments.

In *Livadas v. The Republic* decided on 3rd April, 1982, and reported in (1985) 3 C.L.R. 506, Triantafyllides, P. in dealing with the preparation of confidential reports for a particular year in relation to two officers who at the material time had been seconded to another Department, concluded at p. 510, that:-

«In the light of the legislative provisions I do not think that

Mr. Constantinou was excluded from making the confidential reports in relation to the two interested parties for 1976. Even if, however, I had found that the making of such reports by Mr. Constantinou was an irregularity I would have held that it was
 5 not of material nature vitiating the promotions of the interested parties. Useful reference, in this respect, may be made to the case of *Christou v. The Republic*, (1980) 3 C.L.R. 437, 448.»

In *Themistocleous v. The Republic* (1985) 3 C.L.R. 2652, A. Loizou, J. in dealing with a conflict between the Reporting and
 10 Countersigning officer on the assessments on the applicant's confidential reports and the failure of the countersigning officer to discuss his difference of opinion with the reporting officer, held that such irregularity is not of a material nature and does not vitiate
 15 the administrative act or decision in which it occurs.

The same view was expressed by A. Loizou, J. in *Lofitis and Another v. The Republic* (1986) 3 C.L.R. 1318 in which he held that «failure to comply with Regulation 9 of the Circular to make
 20 corrections in red ink does not vitiate the report» and that there was no material irregularity concerning the reports.

The aspect of illegality was touched in the case of *Christofides v. The Republic* (1985) 3 C.L.R. 1127 where it was held by Stylianides, J. at p. 1135, that:-

«In matters of promotion confidential reports are
 25 intermediate acts and the ascertainment of their invalidity brings the invalidity of all subsequent acts for the issue of which that act found to be illegal constitutes a legal prerequisite — (*Savros Agrotis v. Electricity Authority of Cyprus*, (1981) 3 C.L.R. 503, at p. 513, and the authorities
 30 referred to therein; *Georghiades v. The Republic*, (1982) 3 C.L.R. 16).

The act of the countersigning officer was contrary to paragraph 9 of the Regulations governing confidential reports. (See Appendix 21). Countersigning officers have to
 35 conform strictly with the provisions of the regulations concerning confidential reports especially when any act of theirs might affect adversely the officer concerned.

The aforesaid, i.e. failure to conform with the provisions of paragraph 9 of the Regulations and the lack of due reasoning,

invalidate the intended change in the confidential report for the applicant for 1980. The respondent Commission in the present case in assessing the merit of the applicant took into consideration that the applicant was 'Very Good' in 1980 whereas the interested parties were marked 'Excellent', and this appears that weighed against the applicant and influenced the Commission in taking the sub judice decision. The Commission in the circumstances laboured under a material misconception of fact, the effect of which is to nullify its decision» — (See *Public Service Commission v. Myrianthi Papaonissiforou*, (1984) 3 C.L.R. 370). 5 10

In *Hjilosif v. CYTA* (1986) 3 C.L.R. 1353, Stylianides, J., in considering a deviation from the provisions of the regulations of the respondent Authority concerning nomination of reporting officers and preparation of reports, concluded that such deviation amounted to a material irregularity affecting the validity of the service reports. Also that any decision taken on the basis of an invalid service report is in law defective. 15

In *Alvanis v. CYTA* (1985) 3 C.L.R. 2695, Pikis, J. after he reached the conclusion that the confidential reports in that case had been prepared outside the framework of the Regulations, held that the preparation of such reports was an essential formality to be complied with and as in that case much weight had been attached to such reports, the decision had to be annulled. 20

A perusal of all the above cases shows that the argument in all cases turned on the question as to whether non compliance with the Regulations concerning confidential reports was a material irregularity or not and they were decided mainly on that basis. 25

As already explained earlier in this judgment, the regulations concerning the preparation of confidential reports which have been embodied in Circular 491/79 and which replaced the General Orders which were in force prior to 1979 in this respect, were made by the Council of Ministers in the exercise of the powers vested in it under the Constitution and Law 33/67. Such regulations are not subsidiary legislation in the strict sense but have to be strictly complied with. The deviation by the countersigning officer from the express provisions of such regulations is tantamount to an illegality. Moreover, the sub judice decision should be annulled as violating Article 28 of the Constitution. Every public officer is entitled to expect that the 30 35 40

procedure in the preparation of confidential reports contemplated by the Regulations approved by the Council of Ministers should be strictly adhered to in all cases without any differentiation. Any application of the Regulations in a different manner in each particular case violates the principle that a person is entitled to equal treatment which is safeguarded under Article 28 of the Constitution. We have, therefore, reached the conclusion that the sub judge decision should be annulled on this ground as well.

In the result, the appeal is dismissed but in the circumstances we make no order for costs.

PIKIS J.: In agreement with my brethren I rule that Reg. 9 has the force of law (s. 45(1), Law 33/67) and on that account breach of its provisions constitutes illegal action. Furthermore, failure to adhere to its dictates in an individual case entails separate treatment of a member of a class of public officers in breach of the principle of equality before the law and the Administration safeguarded as a fundamental right by Art. 28.1 of the Constitution.

Thus Reg. 9 defines the framework within which confidential reports should be providing a uniform measure for the evaluation of the services of public officers. It is an essential aspect of the legal regime governing the assessment of the worth of civil servants. Breach of its provisions in any material respect invalidates confidential reports, as well as any other administrative action founded thereon. This I had occasion to explain in some detail in *Karpassitis v. Republic**. Confidential reports, it was stressed, constitute the most consequential consideration for the assessment of the merits of candidates competing for promotion. Necessarily breach of the provisions of Reg. 9 in any material respect renders action founded thereon invalid.

The interests of legality warrant that the Administration should unfailingly adhere to every formality prescribed by law or regulations made thereunder as a condition for the validity of its action. Every departure from the legal norms is treated as consequential unless it is made to appear that the breach was inessential in the sense that it could have no noticeable effect on the essence of the act or that it had none in the circumstances of

* (1986) 3 C.L.R. 1617.

the particular case. In this case breach of the regulation affected a material part thereof and as such invalidated administrative action founded wholly or in part thereon.

Conditions designed to ensure uniformity of treatment of a class of persons similarly circumstanced should, as a rule, be meticulously observed in the interest of equality of treatment safeguarded by Art. 28.1 of the Constitution. Lack of uniformity in the treatment of members of class of persons unavoidably results in inequality of treatment in breach of the fundamental right of the citizen to equality before the law and the Administration.

For the above reasons I associate myself with the order for the dismissal of the appeal.

*Appeal dismissed.
No order as to costs.*