

1987 October 17

[PIKIS J1]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

RONIS SOTERIADES AND OTHERS,

Applicants,

v

THE REPUBLIC OF CYPRUS, THROUGH
THE PUBLIC SERVICE COMMISSION,

Respondent

*(Consolidated Cases Nos 671/85, 777/85,
and 782/85)*

Public Officers — Appointments — Retrospective effect of from a date prior to the scheme of service — Whether possible — In the face of an express statutory sanction such an appointment can be made

Administrative Law — General principles — Retrospective appointments to Public Service — By way of an exception to the general rule this is possible in the face of an express statutory sanction 5

Legitimate interest — Promotions of Public Officers — Scheme of service requiring a particular qualification, but providing that in the absence of candidates possessing it, other candidates may be considered — Candidates who do not possess such qualification, but possess the qualifications of the proviso, cannot compete with other candidates possessing the qualification 10

Public Officers — Promotions — Confidential reports — Circular 491/79 — Regulation 9 — Whether countersigning officer bound to furnish reasons for his disagreement, if after discussion with the reporting officer, a consensus is achieved between the two — Question answered in the negative — Regulations 3(1) and 4(c) — When a report can be prepared and countersigned by one and the same officer 15

Public Officers — Promotions — Head of Department — Lack of personal knowledge concerning candidates — Whether disentitled from making recommendations — Question answered in the negative — The Public Service Law 33/67, s 44(3) 20

By means of these recourses the applicants impugn the validity of the promotion of the four interested parties to the post of Senior Industrial Officer in the Ministry of Labour and Social Insurance

The relevant scheme of service postulated as a necessary qualification for promotion three years service in the post of Industrial Training Officer. However, the proviso to the scheme provided that in the absence of candidates possessing the aforesaid qualification there may be considered for promotion candidates possessing the qualifications envisaged in the proviso.

In this case, interested parties Avraamides and Angelides were promoted to the aforesaid post as being the only candidates who possessed the aforesaid qualification of three years' service in the post of Industrial Training Officer. Interested parties Pastos and Panayides were promoted under the proviso.

M Avraamides and Chr Angelides joined the government service in the year 1978 on a temporary basis, the terms and conditions of their service being regulated by their contract. They were assigned duties in the appropriate department of the Ministry of Labour corresponding to those subsequently associated with the duties of Industrial Training Officers.

Law 32/81 provided for the creation of the post of Industrial Training Officer. Law 33/81 amended the Ordinary and Development Budgets with a view to making appropriate financial provision for the allocation of funds for the filling of the posts specified therein, including that of Industrial Training Officer.

The Temporary Civil Servants (Appointment to Public Positions) (Amendment) Law (Law 15/82), provided for the appointment of temporary government personnel to positions in the public service broadly corresponding to the duties they had temporarily performed. The law expressly empowered the Public Service Commission in making appointments regulated thereunder to give retrospective effect to them going back to the date of the enactment of the basic law.

On 12/8/1982, M Avraamides and Chr Angelides were appointed to the post of Industrial Training Officer with effect from 10/7/1981, that is, the date on which the laws making provision for the post (32/81 and 33/81) were promulgated in the official Gazette.

Counsel for the applicants contended this was wrong as the Public Service Commission lacked the necessary legal justification in 1982 to give retroactive effect to the appointments of M Avraamides and Chr Angelides.

The promotion of the other two interested parties, who, like the applicants, qualified under the proviso to the scheme of service, was challenged on the following grounds, namely breach of rule 9 of the Regulations concerning preparation of confidential reports (Circular 491/79), some of the confidential reports on one of the interested parties were prepared and countersigned by one and the same officer, lack of personal knowledge of the candidates.

disentitling the Head of the Department from making a recommendation, and failure on the part of the respondents to appraise in a correct perspective the facts before them.

Held, *dismissing the recourses*: (1) The principle of administrative law is that by way of exception to the general rule it is permissible to make retroactive appointments to a post in the face of express statutory sanction. In the light of the express provision to this effect by Law 15/82, the decision of 12.8.82, whereby Avraamides and Angelides were appointed to the post of Industrial Training Officer with retrospective effect, was a legitimate exercise of the discretion of the respondents.

A scheme of service, no doubt, is a prerequisite for the filling of the post, but in no way seals the operative date from which appointment to a particular position may be effected. And in the face of explicit statutory authority an appointment to a position can be made from a date prior to the approval of a scheme of service.

Since interested parties Angelides and Avraamides satisfied the scheme of service, whereas the applicants were only qualified under the proviso, the applicants were not entitled to compete with the said interested parties and, therefore, lack legitimate interest to challenge their promotion. The Commission rightly avoided comparison of these two interested parties with the other candidates.

(2) It is now settled that the provisions of Reg. 9 must be strictly complied with as a condition for the validity of confidential reports. Reg. 9 casts a duty upon the countersigning officer to reason his disagreement with a reporting officer if after discussion of the matter between the two, differences between them persist. There was none in this case and for that reason no duty was cast on the countersigning officer to furnish any further reasons.

(3) The preparation and countersigning of a report by one and the same officer is permitted by the regulations (Reg. 3(1) and 4(c)), whenever the hierarchical exigencies of the service make it unavoidable. This occurs whenever the reporting officer is also the Head or Acting Head of the Department.

(4) The application of s. 44(3) of the Public Service Law is not dependent on the possession on the part of the Head of the Department of personal knowledge of the candidates competing for promotion. It is part of the supervisory duties of a Head of a Department to acquaint himself through official channels of the competency of the personnel of the department and of their devotion to duty; as indeed Mr. Christodoulou appears to have done in this case, resting his recommendations primarily on the service record of the candidates.

3 C.L.R. Soteriades and Others v. Republic

(5) In the light of the material before them it was certainly open to the respondents to choose the interested parties in preference to the applicants

Recourses dismissed

Cases referred to

- 5 *Panayides v Republic* (1973) 3 C L R 378,
Afxentou v P S C (1973) 3 C L R 309,
Republic v Argyndes (1987) 3 C L R 1092
Karpasitis v Republic (1986) 3 C L R 1617,
Charalambous v Republic (1985) 3 C L R 992,
10 *Mettas v Republic* (1985) 3 C L R 250,
HadjiVassiliou and Others v The Republic (1974) 3 C L R 130

Recourses.

Recourses against the decision of the respondent to promote the interested parties to the post of Senior Industrial Officer in the Ministry of Labour and Social Insurance in preference and instead of the applicants.

- 15 *A. S. Angelides*, for applicants in Cases Nos. 671/85 and 777/85.
N. Papaefstathiou, for applicant in Case No. 782/85.
20 *P. Hadjidemetriou*, for respondent.

Cur. adv. vult.

PIKIS J. read the following judgment. The three recourses under review raise separate challenges to the same administrative act whereby the four interested parties, namely, M. Avraamides, Chr Angelides, S. Pastos and Ph. Panayides, were promoted to the post of Senior Industrial Officer. After receiving the report and recommendations of the Departmental Committee and hearing the views of the Head of the Department, namely, Mr. Christodoulou, the Director-General of the Ministry of Labour, the respondents appointed:

(a) M. Avraamides and Chr. Angelides as the only candidates who satisfied the scheme of service and were by the terms of it entitled to preference to the exclusion of everybody else; and

(b) S Pastos and Ph Panayides by reference to the proviso to the scheme of service entitling the respondents to fill any vacant posts resulting from the absence of qualified candidates under the scheme of service as best qualified compared to other candidates entitled to consideration under the proviso, including the three applicants 5

The promotion of M Avraamides and Chr Angelides is questioned on the ground that the Public Service Commission misconceived the facts relevant to their service in the post of Industrial Training Officer. The scheme postulated as a necessary qualification for promotion three years service in the post of Industrial Training Officer. Only in the absence of candidates possessing that qualification could consideration be given to candidates having the qualifications envisaged in the proviso thereto. If it is found that the two interested parties satisfied the scheme of service the applicants, each one of them, were ineligible to compete with them and on that account would lack legitimate interest to challenge their promotion. 10 15

The Public Service Commission rightly avoided a comparison between M Avraamides and Chr Angelides and the remaining candidates considering the scheme of service and the exclusive provisions of the principal part of it. Therefore, in relation to the promotion of the afore-mentioned interested parties, the only question that arises for determination is whether they satisfied the scheme of service and whether the decision of the respondents to that end was a valid exercise of their discretionary powers. Questions of comparative worth and issues affecting the validity of the confidential reports on interested party Pastos arise only in connection with the challenge of the promotion of the other interested parties. We shall proceed first with an examination of the eligibility of interested parties M Avraamides and Chr Angelides under the first part of the scheme of service and then address ourselves to questions affecting the validity of the appointment of the other two interested parties. 20 25 30

M Avraamides and Chr Angelides joined the government service in the year 1978 on a temporary basis, the terms and conditions of their service being regulated by their contract. They were assigned duties in the appropriate department of the Ministry of Labour corresponding to those subsequently associated with the duties of Industrial Training Officers. In 1981 a law was 35 40

enacted, notably Law 32/81, whereby provision was made for the creation of the post of Industrial Training Officer. Another law was promulgated on the same day designed to amend the ordinary and development budgets with a view to making appropriate financial provision for the allocation of funds for the filling of the posts specified therein, including that of Industrial Training Officer. In this way the ground was paved for the adoption of the measures necessary to fill the post once provision for their filling was made in the Budget.

10 In the year following a law was enacted, the Temporary Civil Servants (Appointment to Public Positions) (Amendment) Law (Law 15/82), whereby provision was made for the appointment of temporary government personnel to positions in the public service broadly corresponding to the duties they had temporarily performed. The law expressly empowered the Public Service Commission in making appointments regulated thereunder to give retrospective effect to them going back to the date of the enactment of the basic law. The object of this provision was to confer discretion upon the Public Service Commission to give retroactive effect to appointments made pursuant to the provisions of the law from the date on which provision was made for the establishment of the posts to be filled. Provided always that the appointees were at the particular time in the public service and performed duties corresponding to those of the post to which they would be appointed.

Sequentially to the above legislative developments, the Council of Ministers approved on 17th June, 1982, the scheme of service whereby appointments could be made to the position of Industrial Training Officer. Shortly afterwards, on 12.8.1982, M. Avraamides and Chr. Angelides were appointed to the post of Industrial Training Officer with effect from 10.7.1981, that is, the date on which the laws making provision for the post (32/81 and 33/81) were promulgated in the official Gazette. Reverting to the sub judge decision, the respondents accepted the decision relevant to their appointment on its face value and treated the service of the interested parties at the position of Industrial Training Officer as commencing on 10th July, 1981. Counsel for the applicants contended this was wrong as the Public Service Commission lacked the necessary legal justification in 1982 to

give retroactive effect to the appointments of M. Avraamides and Chr. Angelides. Detailing the submission it is to the effect that it was incompetent for the Public Service Commission to make a retrospective appointment to a post prior to its formalization by the adoption of an appropriate scheme of service. In an indirect way we are required to review the validity of a decision of the Public Service Commission in the context of the fact finding process of ascertaining the length of service of interested parties at the position of Industrial Training Officer. Assuming this is at all possible, a proposition I should not be deemed as affirming, the submission is ill-founded and bound to fail in view of the principle of administrative law that by way of exception to the general rule it is permissible to make retroactive appointments to a post in the face of express statutory sanction*.

Legislative authorization for the retroactive filling of the post of Industrial Training Officer was explicitly given by Law 15/82. Consequently the decision of the Public Service Commission of 12th August, 1982, supposing, I repeat, if it is at all open to this Court to query its apparent effect, was a legitimate exercise of their discretionary powers. A scheme of service, no doubt, is a prerequisite for the filling of the post, but in no way seals the operative date from which appointment to a particular position may be effected. And in the face of explicit statutory authority an appointment to a position can be made from a date prior to the approval of a scheme of service. All the more the retroactive appointment could be made in view of the actual discharge by M. Avraamides and Chr. Angelides of the duties of Industrial Training Officer from the date of their effective appointment. In my judgment it was at the least reasonably open to the respondents to conclude that M. Avraamides and Chr. Angelides qualified under the first leg of the scheme of service and on that account they were eligible for promotion to the exclusion of anybody in the position of the applicants who did not satisfy that part of the scheme.

The promotion of the other two interested parties who like the applicants qualified under the proviso to the scheme of service, is challenged on the following grounds:-

* *Petrakis Panayides v. Republic* (1973) 3 C.L.R. 378 (F.B.); *Afkentou v. P.S.C.* (1973) 3 C.L.R. 309 (A. Louzou, J.)

(a) Failure of respondents to address themselves to the implications of alleged breach of Rule 9 of the Regulations*.

5 (b) Failure to give due consideration to the fact that some of the confidential reports on one of the interested parties were prepared and countersigned by one and the same person.

(c) Incompetence on behalf of Mr. Christodoulou, the Director of the Ministry, to make recommendations in the capacity of Head of the Department. Lack of personal knowledge on his part of candidates disintitling him, according to the contention of
10 applicants, from making a recommendation. And,

(d) Abuse and excess of powers arising from failure on the part of the respondents to appraise in a correct perspective the facts before them relevant to the suitability of candidates for promotion.

The first two grounds enumerated above relate solely to the
15 appointment of Mr. Pastos, whereas the other two affect the validity of the decision to appoint both interested parties. The factual background is that the confidential reports on interested party Pastos for the year 1983 and 1984, the years immediately preceding the sub judice decision, though amended by the
20 countersigning officer, the fact was not explicitly recorded on the reports and more consequently no reasons were given in explanation thereof as warranted by Reg. 9. It is now settled that the provisions of Reg. 9 must be strictly complied with as a condition for the validity of confidential reports. This is the effect
25 of the recent decision of the Full Bench of the Supreme Court in *Republic v. Argynides*** acknowledging, inter alia, constitutional importance to Reg. 9 pertaining to equality of treatment. Moreover, confidential reports are, as often pointed out, a prime pointer to the definition of the merits of an officer and
30 performance in the public service and as such cast as a matter of substance a corresponding duty on the Administration to adhere strictly to the provisions of the regulations relevant to their preparation.

Evidence before the Court coming from Mr. Kapetanios, the
35 reporting officer, and Mr. Demetriades, the countersigning officer,

* Circular 491 of 26 3 1979

** RA. 678 decided on 11 6 1987, reported in (1987) 3 C.L.R. 1092. See also *Karpassis v Republic* (1986) 3 C.L.R. 1617

established that the alterations of the assessment of the services of Mr Pastos were made after an exchange of views between the two and more significantly, agreement as to the justification of the alterations made. In those circumstances the ultimate rating recorded in the confidential reports reflected the consensus between the two and made the reports the product of their combined assessment. In those circumstances it was unnecessary to provide reasons for the alterations for we are not truly concerned with alterations but with a re-assessment of the value of the services of the party reported upon. A duty is cast upon the countersigning officer to reason disagreement with a reporting officer if after discussion of the matter between the two, differences between them persist. There was none in this case and for that reason no duty was cast on the countersigning officer to furnish any further reasons.

Equally unsuccessful is the case for the applicants concerning the preparation of the reports on Mr Pastos for the years 1979 and 1980. The reports for both years were prepared and countersigned by one and the same officer. This course is permitted by the regulations (Reg 3(1) and 4(c)), whenever the hierarchical exigencies of the service make it unavoidable*. This occurs whenever the reporting officer is also the Head or Acting Head of the Department. Nothing was placed before the respondents or the Court for that matter to suggest that the officer who acted in the dual capacity lacked authority to do so.

In view of the above, I conclude that the respondents did not misconceive the facts relevant to the confidential reports on interested party Pastos, consequently, they could properly have regard to them in the discharge of their duty to fill the posts in question.

Objection was raised to the Director of the Ministry, Mr Chnstodoulou, imparting his views and making a recommendation on the suitability of the candidates on account of lack of personal knowledge on his part and generally lack of adequate information about the functioning of the Ministry. He had been newly appointed to the position of a director and his knowledge about the personnel of the Ministry and their worth

* *Chara'ambous v Republic* (1985) 3 C L R 992

could not but be limited in view of the shortness of the duration of his service as director of the Ministry. The application of s 44(3) of the Public Service Law is not dependent on the possession on the part of the Head of the Department of personal knowledge of the candidates competing for promotion. It is part of the supervisory duties of a Head of a Department to acquaint himself through official channels of the competency of the personnel of the department and their devotion to duty, as indeed Mr Chnstodoulou appears to have done in this case resting his recommendations primarily on the service record of the candidates*

Another objection to the participation of Mr Chnstodoulou in the selection process is that he was not the Head of the Department. It appears from the material before the Court that the Department was without a Head at the time on account of the retirement of Mr Protopapas and as far as we may gather the Director of the Ministry assumed direct responsibility for the management of that department for as long as the post was vacant. Neither of the above objections can succeed either

Lastly the validity of the decision was questioned by reference to the merits of the candidates. In the contention of counsel for the applicants the respondents overlooked the seniority of the applicants in the service or did not pay sufficient heed to that factor. Examination of the minutes of the respondents does disclose that the seniority of the applicants was duly noticed but found insufficient to tip the scales in their favour in view of the merits of the interested parties as emerging from their confidential reports. In the light of the material before them, it was certainly open to the respondents to choose the interested parties in preference to the applicants. Their decision is not fraught either with a misappreciation or misconception of the facts relevant to the merits, qualifications or seniority of the candidates

The three consolidated recourses fail and are dismissed. The sub-judice decision is affirmed pursuant to the provisions of Art 146 4(a)

Recourses dismissed

* *Mettas v Republic* (1985) 3 C.L.R. 250. *Demetrios Hadji Vassiliou & Others v The Republic* (1974) 3 C.L.R. 130