

1988 May 31

[A. LOIZOU, P.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

CHRISTAKIS N. SERGHIDES AND ANOTHER,

Applicants,

v.

THE REPUBLIC OF CYPRUS, THROUGH
THE PUBLIC SERVICE COMMISSION,

Respondent.

(Cases No. 246/85, 433/85).

Public Officers—Promotions—Confidential reports—Reports prior to 1979 compiled by an officer, who was not the head of the Department—Failure to countersign them—Promotions effected in 1984—Irregularity of such reports occurred in too distant in time to affect sub judice promotions.

Public Officers—Promotions—Confidential reports—Rating of "average"—Not adverse in the sense of section 45(4) of the Public Service Law, 1967 (Law 33/67), if it does not attribute fault or lack of interest to the officer concerned. 5

Public Officers—The Public Officers (Restructuring of Certain Offices and Other Connected Matters) Law, 1984 (Law 20/84), section 20—Ambit of.

Public Officers—Promotions—Head of Department—Recommendations—Not followed, because of the superior merit of interested party—Decision upheld. 10

Public Officers—Promotions—Seniority of 71½ years—Superiority in merit of the interested party—Despite such seniority, in the circumstances it was reasonably open to the Commission to promote the interested party. 15

Public Officers—Promotions—Qualifications—Due inquiry—"Very good knowledge of English"—Whole career of candidates before the Commis-

sion—Evident therefrom that the interested party had the required knowledge—Reasonably open to the Commission to arrive at the relevant finding.

- 5 *Public Officers—Promotions—Qualifications—Due inquiry—Failure to rate candidates for "leadership" for the year 1980, but rating them for the years 1981, 1982 and 1983—Complaint that in the absence of rating in 1980 the interested party was wrongly considered as possessing relevant ability—Complaint unfounded—If it were to be upheld, applicants would lack legitimate interest.*
- 10 *Public Officers—Promotions—Confidential reports—Circular 491/79 relating to their preparation—Reports compiled by Head of Department alone—Head of Department had direct knowledge and supervision of the rated officers—Reports not contrary to aforesaid circular.*
- 15 *Public Service—Salaries—General revision of, in the whole of the public service as opposed to the upgrading or regrading of a particular post or group of posts—The practice followed in each of such case prior to the coming into operation of the constitution.*
- 20 *Public Officers—Promotions—Qualifications—Scheme of service—"Service" in a post required as qualification—Several of the duties of the post not assigned to the holder of the post—This is not the fault of the officer and it cannot be said that he did not have "service" in the post.*

The principles expounded by the Court in dismissing these recourses sufficiently appear in the hereinabove headnotes.

*Recourses dismissed.
No order as to costs.*

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Cases referred to:

Kolokotronis v. The Republic (1980) 3 C.L.R. 418;

Constantinidou v. The Republic (1974) 3 C.L.R. 416;

Christou v. The Republic (1985) 3 C.L.R. 2237;

30 *Republic v. Pericleous (1984) 3 C.L.R. 577;*

Loucas v. The Republic (1965) 3 C.L.R. 65;

Petrides and Others v. The Republic (1987) 3 C.L.R. 1166.

Recourses.

Recourse against the decision of the respondent to promote the interested party to the post of Chief Fisheries Assistant in the Fisheries Service in preference and instead of the applicants.

A.S. Angelides, for applicant in Case No. 246/85. 5

E. Markides (Mrs), for applicant in Case No. 433/85.

D. Papadopoulou (Mrs), for the respondent.

Cur. adv. vult.

A. LOIZOU P. read the following judgment. By the present recourses which were tried together as they present common issues of law and fact the applicants pray for a declaration of the Court that the decision of the respondent Commission to promote C. Christofides to the post of Chief Fisheries Assistant in the Fisheries Service, is null and void and of no legal effect whatsoever. 10

As the post in question is a promotion post from the post of Senior Fisheries Assistant, a list of the eligible officers for promotion was sent to the Departmental Board together with their confidential reports and copies of the scheme of service for the post. The Departmental Board from the material before it decided that out of the four candidates the three possessed the required qualifications that is 1. Chr. Sergides, 2. A. Keleshis and 3. C. Christofides, i.e. the two applicants and the interested party. 15 20

Subsequently, the respondent Commission met on the 28.12.84 and heard the views and recommendations of the Head of the Fisheries Service. He recommended A. Keleshis who is the most senior and described him as quite experienced who has had his training, is professional and has initiative. 25

He further stated that the English of all the candidates are very-

good and described their output for 1984 as follows:

"Sergides: About the same as 1983

Christofides: His output was slightly reduced

Keleshis: About the same as 1983."

5 Subsequently the respondent Commission examined the material factors from the file of the filling of the post and from the candidates' personal files and confidential reports, considered the conclusions of the Departmental Board and the views and recommendations of the Head of Department. It also noted that the confidential reports of Christofides were the best of the three and were close to being excellent. Sergides was the most senior followed by Christofides and last by Keleshis.

15 The respondent Commission considered that it could not adopt the recommendations of the Head of the Department concerning the promotion of Keleshis because Christofides had better confidential reports which were close to being excellent even though his output in 1984 was slightly reduced, nonetheless he was still of a higher standard than Keleshis and was moreover more senior. As far as the higher qualifications of Keleshis were concerned though they were taken into consideration yet since they were not required by the scheme of service, they could not constitute an advantage. Finally as regards the seniority by 7 1/2 years of Sergides over Christofides, the respondent Commission considered that it could not override Christofides' superiority. In conclusion, 25 the respondent Commission decided to promote Christofides as the most suitable for the post in question. Hence the applicants filed the present recourses.

30 Applicant Serghides in Recourse No. 246/85 contended that the interested party lacked the qualifications required by the Scheme of service, that is "very good knowledge of English" and "administrative and organising ability".

The possession of the required qualifications was examined by the Departmental Board which considered that those recommended by it did possess such qualifications. The matter was also considered by the respondent Commission. In the first place, the whole career of the candidates, as appearing in their personal files and confidential reports was before the respondent Commission wherefrom it was evident that the interested party did possess such qualifications. (See *Kolokotronis v. Republic* (1980) 3 C.L.R. 418 at p. 426). Furthermore, their Head of Department who had close personal knowledge of all candidates, when he appeared before the respondent Commission stated that the English of all the candidates was very good. 5 10

In the particular circumstances of this case, I find therefore that it was reasonably open to the respondent Commission to consider that on the material it had before it, the candidates possessed the required knowledge of English. I do not consider that the respondent Commission merely adopted the findings of the Departmental Board, or the statement of the Head of Department without themselves conducting a due inquiry and I therefore find that this argument of the applicants must fail. 15 20

As far as the question of the interested party possessing administrative and organising ability is concerned all candidates prior to the sub-judice promotions held the post of Senior Fisheries Assistant which is a post with duties according to its Scheme of Service involving ability to control and supervise subordinate staff, initiative and responsibility. As far as the argument of the applicant that the interested party not having been rated for the item "leadership" in the reports of 1980 is concerned, he could not as a result possess such ability, I find, from a perusal of the relevant reports, that none of the candidates including the present applicants and the interested party, were so rated in that year and that moreover for the years 1981 to 1983 the applicants were rated as good whereas the interested party was rated as very good as regards "leadership". 25 30

If I were to uphold the above arguments of the applicants they 35

themselves would equally not possess such qualification and would thus lack the necessary legitimate interest to file these recourses - (*Constantinidou v. Republic* (1974) 3 C.L.R. 416).

5 It was next contended that the confidential reports were contrary to Law, having been compiled by the Director of the Fisheries Service alone who in the case of the applicant in Recourse No. 246/85 did not have personal knowledge and supervision of the work of this applicant. It was further argued that this applicant had been evaluated as average in his reports without having been given prior warning.

10 I consider that the confidential reports in question are quite in order. Despite the fact that the reports of all parties were compiled by their Head of Department, since such person had direct knowledge and supervision of their work it was neither contrary to Law
15 nor to the circular of the 26.3.1979 No. 491 or any General Orders, for such person to be both reporting and countersigning officer. As far as the reports prior to 1979 are concerned when the reporting officer was not the Head of the Department but the Fisheries Officer, which reports do not appear to have been countersigned by any officer superior to the reporting officer, I would
20 consider, if it were to be found that they were irregular in any way that they are too distant in time vis a vis the sub judice decision to have affected its validity.

25 As far as the argument of this applicant is concerned, that having been evaluated as "average", he should have been warned, I also find that it is without merit. There is no requirement to give prior warning to an officer if his report is not an adverse one (See: *Christou v. Republic* (1985) 3 C.L.R. 2237 at 2241-2242); and a rating of an officer as average is not considered as an adverse one
30 under section 45(4) of the Public Service Law 1967 (Law No. 33 of 1967); and paragraph 11 of the Circular of 1979 imposing a requirement of warning must be read in the light of the particular provisions of Law No. 33 of 1967. A rating of average which does not display any lack of interest or fault on behalf of an officer but
35 only refers to such officer's capabilities does not render adverse a report containing it.

As far as Recourse No. 433/85 is concerned the following further arguments were put forward.

It was contended that the respondent Commission wrongly considered that the interested party was an eligible candidate since the applicant in this recourse satisfied the requirement of three years service in the post of Senior Fisheries Assistant; the respondent Commission could not have promoted any officer on the basis of the proviso to the scheme of Service, since the applicability of such proviso was dependant on the non existence of candidates with 3 years service in the post of Senior Fisheries Assistant. 5 10

It was alleged that the interested party having been promoted to the post of Senior Fisheries Assistant on 15.1.82, had on the date the request for the filling of the post was received, that is, the 16.8.84, (*Republic v. Katerina Pericleous* (1984) 3 C.L.R. 577) less than the three years required by the scheme. On the other hand, on that date the applicant did have the required three years having been appointed to the post of Master Fisherman on 1.1.73 the title (and salary) of which was changed to Senior Fisheries Assistant on 1.1.84 by virtue of the Public Officers (Restructuring of Certain Offices and other Connected Matters) Law 1984 (Law No. 20 of 1984), as a result of which he is deemed to have held the post of Senior Fisheries Assistant as from 1.1.73. 15 20

I consider this argument to be without merit as section 4 of Law No. 20 of 1984 provides, inter alia, as follows:

"..... a public officer holding immediately prior to the appointed date any post from those appearing in the first column of Schedule C, which is replaced by the post appearing in its second column, is emplaced from the appointed date or from the date of his appointment/promotion to his old post appearing in the first column of the said Schedule, whichever of such dates is the later..." 25 30

The aforesaid provisions of the law leave no doubt that the relevant date in the present instance, being the later, is the "appoint-

ed date" according to the law that is the 1.1.1984 and it is on that date that the post of this applicant was replaced. His argument therefore must fail as he does not have the three years service in the post of Senior Fisheries Assistant, as alleged and the respondent Commission therefore was entitled to select candidates on the strength of the proviso.

Relevant to this issue I would also consider the case of *Loucas v. The Republic* (1965) 3 C.L.R. 65 where the following was stated at pp. 70-71:-

10 "In the case of a general revision of salaries i.e. where the salary structure of the whole of the public service is revised, the Court is satisfied that the practice which had been followed in such cases before the coming into operation of the Constitu-
15 tion was that a public officer should enter his new scale at the point he would have reached if the new scale had been in force since his appointment to the post in question. Where, howev-
er, the change of salary was due not to a general revision but to an upgrading or regrading of a particular post or group of posts i.e. was an individual class revision as distinct from a
20 general revision it has been established to the satisfaction of the Court that the procedure then followed was the procedure laid down in Colonial Regulation 37 of the 1956 Edition of the Colonial Regulations which was, generally speaking, to the ef-
fect that, if an officer's old salary was less than the minimum of the new salary then the officer drew the minimum salary of
25 the new post; if the old salary was not, however, less than the minimum of the new salary then the officer continues to draw his salary until, by length of service, he earns enough incre-
ments which would bring his salary to the next incremental step in the new salary scale."

30 On the point of qualifications it was further argued on behalf of this applicant that the interested party having been assigned duties other than those specified in the scheme of service for the post had no "service" as such in the post of Senior Fisheries As-
35 sistant, as reference to "service" in a scheme means actual exer-

cise of the duties of the post and not merely holding such post.

In the first place, since in the relevant scheme of service there is provision that an officer holding such post is to perform also "any other duties that may be assigned to him" it cannot be considered that the interested party was not performing the duties of his post. Secondly it is no fault of an officer who performs duties assigned to him by his superiors, if there are duties specified in his scheme of service which have not been assigned to him; such matter cannot be held against him nor exclude him from promotion. See *Conclusions of the Decision of the Greek Council of State 1929-1959* p. 341-342; *Petrides & Others v. Republic* (1987) 3 C.L.R. 1166. Furthermore the fact that in certain instances the time spent abroad on educational leave by an officer is considered as service up to a maximum of two years also does not support the view of the applicant. This ground also fails.

For all the above reasons I find that the sub-judice decision was properly reached, after a due inquiry and in accordance with the Law and is duly reasoned. The recourses therefore fail and are hereby dismissed but in the circumstances there will be no order as to costs.

*Recourses dismissed.
No order as to costs.*