

1988 June 30

[A. LOIZOU, P.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

STELIOS VASSILIOU,

Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH
THE PUBLIC SERVICE COMMISSION,

Respondent.

(Case No. 841/85).

Public Officers—Promotions—Qualifications—When candidates' qualifications are in doubt—As a rule there must be an inquiry with the candidate concerned—Failure, however, to follow the rule may not lead to lack of due inquiry or to a misconception of fact.

Annuling decision of this Court—Effect—Principle that new decision must be taken on the basis of the legal and factual situation existing at the time the annulled decision was taken—Annulment of promotion of public officer on ground of lack of due inquiry as to possession of additional qualification—Re-examination of matter—Collection of material regarding such qualification—No violation of aforesaid rule. 5
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Public Officers—Promotions—Head of Department—Recommendations—A material independent factor determining merit.

Public Officers—Promotions—Judicial control—Principles applicable.

Public Officers—Promotions—Seniority—Prevails only if the other two factors (Merit and Qualifications) are more or less equal. 15

The promotion of the applicant to the post of Senior Industrial Officer was annulled by a Judge of this Court (See *Karis v. The Republic* (1985) 3 C.L.R. 496) on the ground of lack of due inquiry as to possession of the additional qualifications envisaged in the scheme of service by the applicant and the interested party. 20

As a result the respondent Commission re - examined the matter.

5 The Commission asked from the British Council Representative in Cyprus clarifications regarding applicant's membership of the Institute of Mechanical Engineers. By letter dated 11.4.1985 the Council placed such qualification in the post graduate level. However, by letter dated 27.5.85 the Commission was asked not to take any decision on the basis of the previous letter. By letter dated 4.11.1985 the Council reverted to the matter and clarified that such qualification was not a post - graduate one.

10 It must further be noted that the interested party forwarded to the Commission certain printed material and documents, relating to applicant's qualifications, including material placed by the applicant himself before the Court, which annulled the previous promotion.

15 The Head of the Department stated before the Commission that he had studied all the material in the files, but he would not like to make any comments. However, he proceeded to mention that during his original assessment at the inquiry which led to the annulled promotion he had taken into consideration material, which later proved not to be correct. He finally added that he believed the interested party to be superior to the applicant.

Held, dismissing the recourse:

20 (1) Though as a rule, when a candidate's qualifications are in doubt, the organ must inquire with him about them as part of the proper inquiry that has to be carried out, yet, failure to observe such rule may not affect the sufficiency of the inquiry, or need not result in any material misconception affecting the interpretation of the scheme of service. In the circumstances of this case and considering that the applicant had ample knowledge of the fact
25 that what was in issue before the Commission was the sufficiency of his qualifications claimed to constitute an advantage under the scheme, one would expect him to address to the respondent Commission and supply to it necessary material if he had any, in addition to those it produced to the
30 Court in the previous case. He knew that the interested party had questioned the possession by him of the advantage and he had in that way the opportunity and the possibility to submit his views and representations to respondent Commission.

35 (2) There is nothing to support applicant's contention that the Commission, by inviting the Head of the Department to express an opinion, violated the principle that at the re - examination of an annulled decision there is taken only into consideration the legal and factual situation that exists at the time the annulled decision was taken.

In view of the annulling decision the Commission had to inquire about possession of the additional qualifications. The relevant material which was collected did not constitute new factors, but only necessary information.

Recourse dismissed.
No order as to costs. 5

Cases referred to:

Frangoulides and Another v. Public Service Commission (1985) 3 C.L.R. 1680;

Nissioti v. The Republic (1977) 3 C.L.R. 388 - 397;

Psara v. The Republic (1985) 3 C.L.R. 229, at p. 242; 10

Spanos v. The Republic (1985) 3 C.L.R. 1826, at p. 1833;

Partellides v. The Republic (1968) 3 C.L.R. 480;

Hadjisavva v. The Republic (1982) 3 C.L.R. 76.

Recourse.

Recourse against the decision of the respondent to promote the interested party to the post of Senior Industrial Officer in preference and instead of the applicant. 15

A.S. Angelides with P. Papageorghiou, for the applicant.

P. Hadjidemetriou, for the respondent .

G. Triantafyllides, for the interested party. 20

Cur. adv. vult.

A. LOIZOU P. read the following judgment. By the present recourse the applicant seeks the annulment of the decision of the respondent Commission by which the interested party Ioannis Kar-

is, was promoted to the post of Senior Industrial Officer instead of the applicant.

The applicant was first appointed in the Government service as an Industrial Extension Officer Class II, on the 1st April 1976. He was promoted to Class I on the 15th April 1981. The interested party was appointed as an Industrial Extension Officer, Class II (Food Technology) on the 15th February 1978, and promoted to Class I on the 15th March, 1982.

The Supreme Court (Stylianides J.), by its judgment in Re-course No. 309/83, reported as *Ioannis Karis v. The Republic* (1985) 3 C.L.R. 496, annulled the decision of the respondent Commission dated the 24th February 1983, by which the present applicant had been promoted to the post of Senior Industrial Officer. The ground of such annulment was that the respondent Commission did not conduct the sufficiently necessary inquiry into the most material aspect of the matter, i.e. the possession of the additional qualification by the applicant and the interested party.

The respondent Commission after notifying the present applicant of the annulment of his promotion decided to re-examine the matter. By letter dated the 10th April 1985, (Appendix 3), the respondent Commission asked from the British Council Representative in Cyprus, clarifications regarding the qualifications of the applicant and in particular regarding the recognition of the Membership of the Institute of Mechanical Engineers and whether the said qualification was considered as a postgraduate diploma, or title, given that he was also a graduate of the Institute of Mechanical Engineers. The British Council replied by its letters of the 11th April 1985, the 27th May, 1985 and the 4th November 1985, (Appendices 4, 5 and 6).

The interested party also addressed to the respondent Commission letters dated the 14th May 1985 and 18th May, 1984 with relevant documents appended thereto in order to assist as it was said, the Commission at the re-examination of the filling of the post in question (Appendices 7 and 8). They are in fact the fol-

lowing:

(a) Copy of a letter from the Council for National Academic Awards of the United Kingdom.

(b) Copy of certificates of the British Council which were produced by the applicant as Exhibits before the Court for the purpose of the previous recourse. 5

(c) Copy of the report of the Department of Education and Science regarding "degrees and equivalent qualifications". This report was also produced as exhibit before the Court.

(d) Extracts from the book "British Qualifications" (15th Ed. - 1985). 10

The respondent Commission at its meeting of the 11th July 1985, (see its minutes Appendix 10), re - examined the filling of the post of Senior Industrial Officer, (Standards and Quality Control). It had at this meeting before it a copy of a letter dated the 23rd May, 1985, from the representative of the Maronite community in the House of Representatives and the Bishop Suffraga of the Maronites, addressed to the President of the Republic, as well as the reply given to them, dated the 28th May 1985, (Appendix 9). In the said letter certain allegations were made to the effect of "improper interference" and the respondent Commission decided not to take them at all into consideration. 15 20

It invited then the Director General of the Ministry of Commerce and Industry who was afforded the opportunity to read from its minutes what he had mentioned to it at the previous consideration of the matter and also to be informed of the information and material given by the British Council to it on the question of the qualifications of candidate Vassiliou. The attention of the Director General was also drawn to certain points made in the judgment of the Supreme Court. 25 30

The Director General then stated that it was a difficult case,

that he had taken into consideration all the material in the files of the two candidates relating to their merit, qualifications and seniority in order to form an opinion and make his recommendations, but he said that he would not like to make any comments on them, as they were all before the Commission which could assess them itself.

He went on, however, to say that:

"What he would like to mention was the fact that at his original assessment and recommendation, he had taken into consideration factors which later, after an inquiry proved not to be correct, and this was proved by the letter of the British Council which he had read earlier as well as from certain material which had been submitted through him to the Commission.

The conclusion which could, in his view, be reached was that the qualifications of Vassiliou could not be considered equivalent to the qualifications of Karis and more concretely that he was not certain whether the provision in the Scheme of Service 'that post graduate diploma or title in a suitable subject will constitute an advantage' was satisfied in the case of Vassiliou. In view of the new elements which had been submitted and taking into consideration the three criteria in their totality he said that he believed that Karis was superior and therefore he was recommended."

The respondent Commission took note of the letters of the representative of the Maronite Community and the Bishop Suffragan (Appendix 9), in which as it is stated in its minute, there were unfounded allegations "for improper interventions which were made by certain situations that prevented fair deal", and decided not to take them into consideration at all.

The respondent Commission then proceeded to evaluate and compare the candidates and there is set out in the relevant minutes the rating of the candidates as found in their respective confidential reports which as stated they examined in their totality, and in

my view rightly so, and indicatively referred to those of the last five years. I shall refer only to those of the applicant and the interested party for the years 1978 to 1982. They are as follows: For the applicant, 1978, ten "very good". 1979 "excellent", (8 - 4 - 0), 1980 "excellent" (8 - 4 - 0), 1981, "very good" (4 - 8 - 0), 1982, "excellent" (9-3-0). For the interested party, 1978, nine "excellent" one "very good", 1979 "very good", (7 - 4 - 1) 1980, "excellent" (8 - 4 - 0), 1981, "excellent" (10 - 2 - 0) 1982 "excellent" (8 - 4 - 0).

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The respondent Commission then noted that the applicant was senior to the interested party on the basis of the date of their promotion to the post they held and considered the qualifications of the candidates and concluded that the additional qualification at the material time was possessed only by the interested party. The minutes then go on to say the following:-

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"The Commission took into consideration all the material factors before it which refer to the material time and in the light of what the Director General mentioned and the reasoned recommendation he made to - day, it considered on the basis of the established criteria in their totality (merit, qualification, seniority) that Ioannis Karis was superior to the other candidates at the material time and decided to promote him as the most suitable to the Permanent (Ordinary Budget) post of Senior Industrial Officer retrospectively as from the 1st March, 1983, that is the same date the promotion of Vassiliou which was later annulled by the Supreme Court, had been made".

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It is the case for the applicant that the sub judice decision suffers in view of the omission of the respondent Commission to carry out a due and proper inquiry and/or it is the outcome of a misconception of fact and/or law and was taken following a procedure contrary to the Case Law and to the basic Principles of Administrative Law.

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It was argued that the respondent Commission relied on the contents of Appendices 3 to 8 in determining whether the qualifi-

5 cation of the applicant "C. ENG" that is Chartered Engineer of the
Institution of Mechanical Engineers could be considered as falling
under the category, that would amount to an advantage under the
scheme. In Appendix 3, the British Council was asked to clarify
10 whether the membership of the Institution of Mechanical Engi-
neers was considered as a postgraduate diploma or title given that
the applicant was a graduate of the Institute of Mechanical Engi-
neers. In its reply Appendix 4, the British Council after settir g
out the prerequisites for obtaining this Chartered Engineer title,
15 clarified that the period of training and professional responsibili-
ty, which follows the academic qualifications place the "C. ENG"
title in the postgraduate level. Appendix (5) is another letter
signed by Mr. M.T. Kassel, Assistant Representative. In this let-
ter the British Council asked no decision to be taken by the re-
spondent Commission on the basis of the previous letter signed
20 by Mr. Zevlaris, its Office Manager until further clarifications
were asked. Counsel for the applicant commented that this last
letter does not appear to have been caused, to be written by the re-
spondent Commission but it was written on the initiative of Mr.
Kassel. Then there followed Appendix (E), in which it is stated
25 that the Institution of Mechanical Engineers is a body constituted
under a Royal Charter granted by her Majesty the Queen to whom
it is responsible through the Privy Council and further down it is
stated, the "C. ENG" is awarded by the Engineering Council and
is nowadays given only after satisfying three criteria; the engineer
30 must satisfy the council as to his academic qualification, his pro-
fessional training and his experience and responsibility. The aca-
demic qualification required nowadays is a First Degree from a
British University in an approved discipline, or a pass in the
Council of the Engineering Institute's own examinations. The pe-
riod of training and professional responsibility is normally not
less than four years long. In paragraph 5 thereof, it is stated,
35 membership of the Institution of Mechanical Engineers and "C.
ENG." are professional titles. They are not Academic Degrees
and as such cannot be compared to any academic postgraduate de-
grees, diplomas or titles. They are considered as suitable in train-
ing requiremnets. If the engineer wishes to pursue his academic
studies further in order to obtain the degree of M.Sc or Ph. D and

for teacher's salary purposes are considered by the Burnham Committee to be of first degree equivalent.

Learned counsel for the applicant submitted that the contents of the letters do not resolve the question posed by the respondent Commission whether the qualifications for which they ask, are considered postgraduate diplomas or titles. 5

On this issue learned counsel for the applicant further contended that the respondent Commission, contrary to the Case Law of this Court, heard allegations by the interested person which referred to the applicant without, however, giving the opportunity to the latter to be heard. In support of this proposition counsel referred to the case of *Frangoulides and Another v. Public Service Commission* (1985) 3 C.L.R. 1680, at p. 1686, in which it was said: 10

"Secondly, we have noted that the candidate who was in the end promoted to the post of Principal Welfare Officer had moved the Commission to examine the question of the sufficiency of the academic qualifications of other candidates, such as the appellants, and we do think that the better course would have been for the Commission to have informed accordingly the affected candidates so as to afford them an opportunity to make their own representation in this connection, even though we do not consider, in the light of all the circumstances of this particular case, that the failure of the Commission to inform the appellants that there had been raised the issue of the sufficiency of their academic qualifications has prevented the Commission from carrying out a due inquiry, or has resulted in any material misconception affecting the interpretation of the scheme of service by the Commission, so as to render it necessary for this Court to annul on this ground the sub judice decision of the Commission." 15 20 25 30

It may be noted here that the question of possession by the applicant of the qualification that constitutes under the scheme of service an advantage was considered by the respondent Commis-

5 sion as it emanates from the letters, (Appendices 7 and 8) and what the interested party did not was to place before the respondent Commission certain printed material and documents, and certain other material which had been produced by the present applicant himself before the Court that tried the case in the first place and which resulted in the annulment of his promotion. Therefore though an administrative organ should as a rule, inquire with a candidate about his qualifications when such organ has doubts as to the standard of his qualifications as part of its proper inquiry into the matter, yet, failure to do so may not affect the sufficiency of the inquiry, or need not result in any material misconception affecting the interpretation of the scheme of service so as to render it necessary for this Court to annul on this ground a decision reached.

15 In the circumstances of this case and considering that the applicant had ample knowledge of the fact that what was in issue before the Commission was the sufficiency of his qualifications claimed to constitute an advantage under the scheme, one would expect him to address to the respondent Commission and supply to it the necessary material if he had any, in addition to those it produced to the Court in the previous case. He knew that the interested party had questioned the possession by him of the advantage and he had in that way the opportunity and the possibility to submit his views and representations to the respondent Commission.

25 The conclusion therefore of the respondent Commission that at the material time the applicant did not possess the said qualification was reasonably open to it and duly warranted by the material before it, such conclusion having been reached after a proper inquiry and without violation of any rule of procedure.

30 The second ground of law relied upon on behalf of the applicant is that the respondent Commission acted under a misconception of fact and/or law as at its re - examination of the matter it did not have in mind a letter of M.T. Kassell to the applicant dated 35 22nd August, 1985, (Appendix 13(A)), with which the author of

that letter admitted indirectly what was contained in the letter, (Appendix 4) which he tried to reserve by Appendices 5 and 6, namely that the qualification of the applicant in "C.ENG" is of postgraduate level. I doubt, however, if by this letter of Mr. Kassell (Appendix 13(A)), he was in any way departing from the views he expressed to the Commission by his letter (Appendix 6). He simply says that he has no reason to question the statement contained in the letter of Mrs Bennett (Appendix 13 (B)).

The third ground relied upon on behalf of the applicant is that the recommendation of the Director General suffers from lack of due inquiry or misconception of fact as regards the qualifications of the applicant. As it emanates from the relevant minutes of the respondent Commission, which have hereinabove been summarized, the Director General was afforded by the Commission sufficient opportunity to inform himself on the matter, peruse the relevant documents and also become aware of the issue which the respondent Commission had to consider. It was after a proper study of the subject that the Director General made his observations and reached his conclusions that are to be found in his recommendations as recorded in the said minutes. It cannot therefore be said that he was acting under any misconception of fact or that he did not carry out a due inquiry.

The fourth ground of Law is that by inviting the Director General to express an opinion on the material that was before the respondent Commission, the latter offended the principle that at the re - examination of an annulled decision there is taken only into consideration the legal and factual situation that exists at the time the annulled decision was taken. There is nothing to suggest that the re - examination did not take place on the basis of the factual and legal situation as it existed on the 24th February 1983. At the re - examination, however, the contents of the various Appendices and in particular 4 and 6 that were taken into consideration do not constitute new factors but necessary information for the respondent Commission to form an opinion whether the qualification of the applicant which he possessed at the material time constituted an advantage under the scheme. The respondent

Commission was bound to seek such information and carry out a proper and due inquiry and this in view of the annulling judgment of this Court according to which the respondent Commission had failed to carry out a due inquiry at the original examination of the matter.

The fifth ground is that the respondent Commission failed to select the most suitable candidate for the post.

On the totality of the material before the respondent Commission as outlined hereinabove I need hardly say anything more than that the decision of the respondent Commission was reasonably open to it.

The interested party was recommended for promotion by the Head of the Department. Such a recommendation had to be taken into consideration in view of the provision of selection 44(3) of the Public Service Law 1961- 1986, which is a material independent factor determining the merit of the officer. It goes to the merit of the candidates and cannot be ignored by the respondent Commission unless special reasoning is given justifying such course. (See *Nissioti v. The Republic* (1977) 3 C.L.R. 388 - 397; *Psara v. The Republic* (1985) 3 C.L.R. 229 at p. 242; *Spanos v. The Republic* (1985) 3 C.L.R. 1826 at p.1833.

No doubt the applicant is slightly senior to the respondent but seniority is not a decisive factor. It is taken into consideration duly and prevails only when two other factors, merit and qualifications are more or less the same. (See *Partellides v. The Republic* (1968) 3 C.L.R. 480; *Hadjisavva v. The Republic* (1982) 3 C.L.R. 76.

Needless to say that in examining the additional qualification of the applicant respondent Commission did examine also, as it says in its minutes, if the interested party possessed the additional qualification too. The interested party had indeed the additional qualification given in particular the fact that he was the holder of the degree of Master of Science in Food Technology and Nutri-

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tion, which was before the respondent Commission at all material times.

For all the above reasons the recourse fails and is hereby dismissed, but there will be no order as to costs.

Recourse dismissed. 5
No order as to costs.