

1988 December 20

[A. LOIZOU, P.]

IN THE MATTER OF ARTICLES 146 AND 28 OF THE CONSTITUTION

ACHILLEAS KALAITJIS,

*Applicant,*

v.

REPUBLIC OF CYPRUS, THROUGH  
1. PUBLIC SERVICE COMMISSION,  
2. MINISTRY OF HEALTH,

*Respondents.*

(Case No. 1074/87).

*Misconception of fact—It is the objective non-existence of a fact taken into consideration in applying an impersonal rule of law for the issuance of the sub judice act.*

5 *Due inquiry—Failure to carry out such an inquiry leading to ignorance of essential and material facts—Such a situation amounts to a misconception of fact.*

*Reasoning of an administrative act—Two conflicting opinions before the administration—Failure to record the reasons for rejecting the one and accepting the other—Rule that in such a case a decision is not duly reasoned not doubted, but held to be inapplicable in the circumstances of this case.*

10 *Public Officers—Promotions—Merit, qualifications, seniority—Applicant superior in merit and qualifications, but interested party senior to him by more than 12 years—Reasonably open to the Commission to promote the interested party.*

15 *The main issue in this case turned on the question of a certificate, possessed by the interested party, stating that "she attended a three year cycle of education in the theory and practical application of Radiography and succeeded in the prescribed examinations". The applicant contended that there*

was never such a cycle of education and that no such examinations were ever held. Having concluded that as regards this issue the Commission conducted an inquiry in depth, the Court decided that there does not exist any foundation for the alleged misconception of fact. The recourse was finally dismissed.

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*Recourse dismissed.*

*No order as to costs.*

*Cases referred to:*

*Ioannides v. The Republic* (1972) 3 C.L.R. 318;

*Mallouros and Another v. The Electricity Authority of Cyprus and Another* (1974) 3 C.L.R. 220;

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*Christodoulou v. C.Y.T.A* (1978) 3 C.L.R. 61;

*Fournia v. The Republic* (1983) 3 C.L.R. 262;

*Skaros v. The Republic* (1986) 3 C.L.R. 2109;

*Christofides v. The Republic* (1966) 3 C.L.R. 732;

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*Iordanou v. The Republic* (1967) 3 C.L.R. 245;

*Mikellidou v. The Republic* (1981) 3 C.L.R. 461;

*Skapoullis v. The Republic* (1984) 3 C.L.R. 554;

*Tasmi v. The Republic* (1988) 3 C.L.R. 782.

**Recourse.**

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Recourse against the decision of the respondents to promote the interested party to the post of Senior Radiographer (Radiodiagnostic) in the Medical Services and Public Health Services in preference and instead of the applicant.

*A.S. Angelides*, for the applicant.

*A. Pappasavvas*, Senior Counsel of the Republic, for the respondents.

*Cur. adv. vult.*

5 A. LOIZOU P. read the following judgment. The post of Senior Radiographer (Radiodiagnostic), is a promotion post from that of Radiographer First Grade (Radiodiagnostic).

10 Under the relevant Scheme of Service, which was approved by the Council of Ministers by Decision No. 25.290, dated 22nd December 1984, the required qualifications are:

- "(a) At least five years service in the post of Radiographer, First Grade, and
- (b) Organising and administrative ability, initiative, responsibility and soundness of judgment."

15 A note thereto provides that "during the first five years after the approval of the present Scheme of Service, if there are no candidates with five years of service in the post of Radiographer First Grade, there may be promoted also officers with a total service of ten years in the post of Radiographer First and Second Grade, or in the post of Radiographer First and Second Grade and the prior post of Radiographer and/or Assistant Radiographer."

25 A Departmental Board was set up on the basis of Regulatory Orders governing the competence and method of operation of Departmental Boards in accordance with Section 36 of the Public Service Laws, 1967-1986. Through its Chairman it submitted to the respondent Commission its report (Appendix 4) in which after examining a list of thirty-four candidates out of which it excluded fifteen as not possessing the required qualifications, it selected

30 four candidates for selection for promotion, among whom the applicant and the interested party.

The respondent Commission at its meeting of the 27th January 1987, took note of the conclusions of the Departmental Board and also of a letter dated 19th December 1986, of a number of "qualified" Radiographers as they describe themselves in contra-  
distinction to the rest of their colleagues, addressed to the Minister of Health and of a letter dated the 20th January 1987, from the Senior Specialist Radiologist, regarding the qualifications of other officers and decided that there was nothing to prevent them to be considered as candidates. The relevant minute of the respondent Commission of the said meeting is Appendix 6.

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The respondent Commission, after holding another meeting with which we are not directly concerned, at its meeting of the 28th August 1987, heard the recommendations of the Director of Medical Services and Services of Public Health, and after he withdrew it started its deliberations with the evaluation and comparison of the candidates. In its relevant minutes (Appendix 8) it concluded that "having examined the material elements from the file of the filling of the Post, as well as the personal files and the confidential reports of the candidates, having taken into consideration the conclusions of the Departmental Board, and the recommendations of the Head of the Department, decided on the basis of the established criteria in their totality (merits, qualifications, seniority) that Agni Mogaster was superior to all other candidates and decided to promote her as the most suitable to the Permanent (Ordinary Budget) post of Senior Radiographer (Radiodiagnostic) Medical Services and Services of Public Health, as from the 15th September 1987."

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The applicant was born on the 13rd November 1946. He was first appointed in the Government Service as an Assistant Radiographer on the 1st April 1974. He was promoted to the post of Radiographer (Radiodiagnostic) on the 1st April 1980 and to post of Radiographer First Grade (Radiodiagnostic) on the 15th June, 1984.

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The interested party was born on the 15th December 1930. She was first appointed in the Government service as an Assistant

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Radiographer on the 9th October 1961. Almost thirteen years earlier than the applicant. She became Radiographer (Radiodiagnostic) on the 1st January 1977, and promoted to the post of Radiographer First Grade, Radiodiagnostic, on the 15th June, 1984.

- 5 The interested party therefore, is in accordance with Section 46(2) of the Public Service Laws, senior to the applicant according to the officers previous seniority.

10 The interested party attended the Athenaidion Gymnasium of Limassol (no certificate) during the years 1942-1948, she has a certificate of a three year training in the theory of practical implementation of Radiography and passed the prescribed examination held at the Nicosia General Hospital in December 1974.

15 The applicant graduated from the Pancyprian Gymnasium for Boys in 1965-1966. He attended the Glasgow School of Radiography during the years 1969-1972. He has an impressive list of qualifications which he obtained in England and during various courses he attended. The respondent Commission referred to the confidential reports of the candidates and indicatively made a comparison of their contents as regards a short list of seven candidates, among whom the applicant and the interested party, for  
20 the last three years during which the applicant is graded as follows:

1984 "E" (7-2-0-3- ΔE)

1985 "E" (9-2-0-1 ΔE)

25 1986 "E" (10-1-0-1 ΔE)

Whereas the interested party's rating is for the years:

1984 "E" (11-1-0)

1985 "E" (12-0-0)

1986 "E" (8-4-0)

This comparison as far as the parties to these proceedings are concerned and indeed as far as the rest of the candidates, present the interested party as possessing higher merit.

The main ground of law relied upon on behalf of the applicant turns on the certificate of a three year training in the Theory of Practical Implementation of Radiography, which the interested party and several of her colleagues obtained after passing successfully the prescribed examinations held at the Nicosia General Hospital (in the case of the applicant in December 1974). 5

The argument advanced is twofold, first that the respondent Commission did not carry out a proper inquiry into the circumstances under which the said certificate was obtained and in particular the extent of the training and the lectures given to its holders, and secondly that the respondent Commission acted under a misconception of fact in as much as it is alleged on behalf of the applicant, there has been neither a three year attendance, nor were there held any examinations. 10 15

In support of the aforesaid propositions I was referred to a passage from *Spyliotopoulos, Manual on Administrative Law* Second Edition, p. 419 to the effect that there exists misconception of fact when there is proved the objective nonexistence of the factual or legal situations which were taken into consideration by the administrative organ for the application of an impersonal rule of law providing for the issue of the act, that is to say, when it is proved that the administrative organ mistakenly took it that there exists the lawful prerequisite. In further support of the aforesaid contention I was referred to the cases of *Ioannides v. The Republic* (1972) 3 C.L.R. 318; *Mallouros and Another v. The Electricity Authority of Cyprus and Another* (1974) 3 C.L.R. 220 at p. 224; *Christodoulou v. C.Y.T.A.* (1978) 3 C.L.R. 61; *Fournia v. The Republic* (1983) 3 C.L.R. 262, at p. 279. 20 25 30

As regards failure to carry out a due inquiry with the result of acting in ignorance of the essential and material facts and such a situation amounting to a misconception of fact, reference was

made to the cases of *Skaros v. The Republic* (1986) 3 C.L.R. 2109; *Christofides v. The Republic* (1966) 3 C.L.R. 732; *Iordanou v. The Republic* (1967) 3 C.L.R. 245; *Ioannides v. The Republic* (1972) 3 C.L.R. 318; *Mikellidou v. The Republic* (1981) 3 C.L.R. 461; *Skapoullis v. The Republic* (1984) 3 C.L.R. 554.

The Certificate possessed by the interested party which was issued by the Ministry of Health on the 1st March, 1975, duly signed and sealed by the Director-General of the Ministry and the Specialist Radiologist of the Medical Services at the time, red 21, reads as follows:

"This is to certify that Agni Mogaster attended a three year cycle of education in the theory and the practical application of Radiography and succeeded in the prescribed examinations which were held in the Nicosia General Hospital on the 18th December 1974."

In a foot-note to the Certificate it is stated that:

"The above cycle of education was organised for the purposes of the Scheme of Service for the post of Radiographer."

That Certificate was attached to the application of the applicant for appointment to the post of Radiographer, submitted on the 8th July 1976 and it was in the light of that qualification that the interested party was selected for promotion among twelve candidates to the permanent post of Radiographer with effect from 1st January 1977.

After the change of the title in 1984, the interested party and thirty-five other Radiographers, Second Grade were promoted on the 25th January 1985 to the combined post of Radiographer First Grade as possessing the qualifications of that post.

The question of the significance of the said certificate was raised with the Minister of Health by a number of Radiographers

describing themselves as the "qualified" ones, in which they complained that the qualifications possessed by several other Radiographers do not correspond to the reality as there never functioned a school of Radiographers in Cyprus and there was never any real three-year training in Cyprus in this branch. The said letter is marked as having been received by the respondent Commission on the 20th January 1987, together with a letter of the other group of Radiographers and a letter by three representatives of those "qualified" ones which together with a letter of the Senior Specialist Radiologist, Dr. Peratitis, were received by the respondent Commission in January 1987 and were before it.

It may also be mentioned that during the meeting of the Departmental Board the members of which were the Director of Medical Services as Chairman, the Senior Specialist, Radiologist, as a member, and in addition to other administrative officers, two Inspectors Radiographers as members namely Mr. M. Taliotis and Mrs. G. Koumenidou, Mr. Taliotis who seems to be the leader of the "qualified" group and also one of the affiants of the three affidavits filed in this recourse, to my mind unnecessarily, made the following statement which was recorded in the report of the Departmental Board, (Appendix 4). It reads:-

"The member of the Departmental Board Mr. M. Taliotis wishes to have the following recorded.

*'On account of the technological progress in the field of Radiology Units, which are placed in our hospitals and the complicated Radiological examinations, I believe that weight must be given to the academic qualifications of the candidates.'*

Needless to say that the interested party as well as the applicant were among those found by the Departmental Board to possess the qualifications required by the relevant Scheme of Service and they were also among the four recommended for promotion in alphabetical order, by it.



Moreover the respondent Commission examined the question of qualifications at its meeting of the 27th January 1987, when it had before it the report of the Departmental Board and examined the question of qualifications and took note of the letters of the qualified Radiographers, dated the 19th December 1986, as well as the letter dated 20th January 1987, of the Senior Specialist Radiologist regarding the qualifications of other officers and decided that there was nothing preventing them from being considered as candidates.

The question therefore of the qualification of the interested party, as well as the significance and legal effect of the certificate in question which was acted upon by the Commission on a previous occasion and which was the subject of criticism by this group of officers, was duly inquired into extensively and in depth, and there does not in my view exist any foundation for the claims of the applicant on this ground as well as on the ground of misconception of fact raised in conjunction with this certificate. Reference may be made to the case of *Constantinou and others v. The Republic* (1966) 3 C.L.R. 862 at p. 869.

There remains now to examine whether the decision is duly reasoned in view of the text of the minutes in which according to counsel there were conflicting opinions as to the facts of the case and there was failure to record the reasons for rejecting the one of such opinions.

In support of this proposition I was referred to the case of *Tasmi v. The Republic*, (1988) 3 C.L.R. 782 at p.788 where I said the following:

"In view of the above statement of the law the sub judge decision is not reasoned because it was reached whilst two conflicting opinions were in existence and there was failure to record the reasons for rejecting one of such opinions (vide Conslusions from the Jurisprudence of the Greek Council of State (supra))".

Without disagreeing with the above passage which was decided on the basis of the facts and circumstances of that case, I find that the principle hereinabove set out does not apply to the facts of the present case, where as I said, there has been a proper inquiry into the issues raised in relation to the certificate and a pronouncement was made unanimously, by the respondent Commission obviously in favour of accepting the said certificate in all its effect, and clearly rejecting the contentions of the "qualified" group of Radiographers.

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In conclusion I would like to say that on the totality of the circumstances before the Commission it was reasonably open to it to arrive at the conclusion it did. The relevant minute, I must say, is a detailed one its meeting of the 28th August 1987, at which the sub judice decision was taken. Appendix 8, bears out that the respondent Commission exercised its discretion properly, it duly reasoned its decision and took note, in addition to all other matters the high confidential reports, the fact that she is the senior of all candidates, superior to them and decided to promote her to permanent post in question, and I find no reason whatsoever to interfere with the sub judice decision.

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For all the above reasons the recourse is dismissed, the sub judice decision is confirmed but in the circumstances there will be no order as to costs.

*Recourse dismissed.  
No order as to costs.*

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