

Case n° 01/2000

Dieng Ababacar

against

WAEMU Commission

(Français) "Fonctionnaire - Recours en indemnisation - Rejection" (In French)

Summary of the
judgment

The Court cannot uphold the claim of a civil servant who has personally contributed to his loss.

*

REPORT BY THE JUDGE-RAPPORTEUR

By application dated 1^{er} October 1998, registered at the Registry of the WAEMU Court of Justice on 2 October 1998 under No 04, Maître Mamadou SAVADOGO, of SCPA Conseil & Défense, Société d'Avocats, 01 BP. 6042, Ouagadougou 01, acting on behalf of Mr Ababacar DIENG, brought an application before the Court seeking an order that the WAEMU Commission pay him the sum of thirty-eight million, eight hundred and ninety-one thousand, six hundred and ninety-five (38,891,695) CFA francs as compensation for the damage caused to him by Decision No 97-046/SP/PC of 27/02/1997.

I. THE FACTS OF THE CASE

Mr Ababacar DIENG was recruited to UEMOA as a senior executive in charge of general administration, by Decision No. 29/96/P.COM dated 19/02/1996.

As his performance was deemed unsatisfactory at the end of the probationary period, the Chairman of the Commission dismissed him by Decision no. 97-046/SP/PC of 27/02/1997.

On appeal by DIENG, dated 6/06/1997, the WAEMU Court of Justice, by ruling no. 3 delivered on 29/05/1998, annulled Decision no. 97-046/SP/PC of 27/02/1997, as the legal formalities for his removal had not been observed (failure to consult the CCRA).

Drawing the consequences of this ruling, the President of the Commission dismissed DIENG by Decision No. 238/98/PCOM of 31/07/1998.

The same decision awarded a special allowance corresponding, for each month of the period from 1^{er} March 1997 to 31 July 1998, to Mr Dieng's basic salary plus housing allowance.

Taking the view that this allowance did not compensate for all the damage he had suffered as a result of Decision No 97-046/SP/PC of 27/02/1997, Mr Dieng applied directly to the Court for an order that the WAEMU Commission pay him the sum of thirty-eight euros.

million eight hundred and ninety-one thousand six hundred and ninety-five (38,891,695) CFA francs.

II. ARGUMENTS PUT FORWARD BY THE PARTIES

The applicant submits that he has suffered non-material and material damage as a result of Decision No 97-046/SP/PC of 27/02/1997 because the fact that it was taken without the opinion of the Advisory Committee on Recruitment and Advancement (CCRA) gave it the characteristics of a dismissal for gross misconduct.

Since he had never been reproached during the probationary period, he considered that he had been the victim of the arbitrariness of the Chairman of the Commission. As this decision means that he has lost all chance of finding another job, and has been forced into debt in order to support his family while awaiting the end of the dispute, the applicant asks the Court to uphold his claims.

The WAEMU Commission, represented by Mr Alioune SENGHOR, Legal Adviser to the Commission, assisted by Maître Harouna SAWADOGO, Bâtonnier de l'Ordre des Avocats, Avocat à la Cour, submits that the action brought by Mr DIENG is inadmissible in form and unfounded in substance.

As a matter of form, the defendant considers that the action should be declared inadmissible for lack of prior recourse. That before asking to be compensated for the prejudice suffered as a result of Decision No 97-046/SP/PC of 27/02/1997, Mr DIENG should first have addressed a request for compensation to the WAEMU Commission. And that it is the UEMOA's refusal to grant a favourable response to his request that may be the subject of a legal action for compensation. As the UEMOA had not been seized of such a compulsory prior request, the defendant considers that the legal action is inadmissible.

That if the action were nevertheless to be declared admissible, the WAEMU Commission maintains that the Court must dismiss it as ill-founded.

Indeed, Mr Ababacar DIENG's duties were terminated by Decision No. 238/98/PCOM of 31/07/1998 in accordance with the texts in force at the WAEMU, following the opinion of the Advisory Committee on Recruitment and Advancement, as the evaluation of his performance was deemed unsatisfactory. At no time did he contest this decision, and he is thus in a situation that excludes any right to compensation; the prior probationary period made DIENG's situation precarious and revocable and constituted another reason for refusing the right to compensation.

Lastly, the Commission considers that the argument that the absence of the opinion of the Advisory Committee on Recruitment and Promotion (CCRA) gave letter no. 97-046/SP/PC of 27/02/1997 the characteristics of a dismissal for gross misconduct is unfounded in that this opinion is not binding on the Chairman of the Commission, even though it is mandatory.

The Court must first rule on its jurisdiction to hear this case, and then on the admissibility of the action, before examining the parties' pleas in law.

Competence :

The Court's jurisdiction to hear this appeal is enshrined in Article 27 of Additional Act No. 10/96 on the Statutes of the WAEMU Court of Justice, which stipulates that "the Court shall have jurisdiction to hear in particular: disputes between WAEMU and its agents as provided for in Article 16 of Additional Protocol No. 1".

Admissibility :

To be admissible, the request must comply with the provisions of Articles 15 § 4, 22 paragraph 2, 26 of the Rules of Procedure and 112 of Regulation No. 1/95/CM of 01/08/1995 on the Staff Regulations of Officials of the WAEMU.

Article 15(4) of the Rules of Procedure states that "the Court shall rule on any dispute between the bodies of the Union and their servants under the conditions laid down in the Staff Regulations".

These conditions are laid down in Article 112 of Regulation No. 01/95/CM on the Staff Regulations of Officials of the WAEMU, which states that :

"The WAEMU Court of Justice has jurisdiction to hear any dispute between the Union and one of its officials.

However, an action shall not be validly brought before the Court unless :

- if the Joint Consultative Committee has previously received a complaint from the person concerned;
- and whether this complaint has resulted in an explicit or implicit decision to reject the complaint, in whole or in part, by the appointing authority.

The appeal must be lodged with the Court within two months of:

- the date of publication of the decision ;
- from the date of notification to the official concerned ;
- of the day on which the person concerned became aware ;
- the date of expiry of the time limit for response, where the appeal relates to an implied rejection decision".

The UEMOA, represented by its agent Alioune SENGHOR, with counsel Harouna SAWADOGO, in its statement of defence dated 28/04/1999, notified to Mr DIENG on 24/05/1999, argued the inadmissibility of the application, without him reacting. Mr DIENG did not provide any evidence in the file to show that he had satisfied the prerequisite required by the texts in force at the UEMOA, prior to his referral to the Court.

If the Court nevertheless considers that Mr DIENG's appeal is admissible without a prior decision, it is necessary to analyse the arguments he develops.

Does the fact that the Commission failed to consult the CCRA constitute a fault likely to prejudice Mr DIENG? The question is whether an illegal act necessarily constitutes a fault?

In principle, the doctrine accepts that any illegality, even if it is attributable to a simple error of assessment, constitutes a fault likely to give rise to public liability. However, in certain cases, liability is not incurred even though the act is illegal, because there is no damage. This is the case where the illegality is due to a formal defect, whereas the decision was founded in law. The same measure could have been taken using a regular procedure, so there is no real prejudice.

Mr Dieng was at the end of his probationary period. As such, the Commission was justified in keeping or dismissing him depending on his results, in compliance with certain procedures. He equated the failure to consult the CCRA with gross misconduct, without saying how or in what way, even though the decision to annul the decision clearly indicated that this was a procedural defect.

Drawing the consequences of this annulment, the Commission adopted the same decision, rectifying the error. Mr Ababacar DIENG's dismissal is therefore the result of Decision no. 238/98/P.COM and not of letter no. 97-046/SP/PC.

As Mr Dieng maintains, would consultation of the CCAR have changed the order of things?

It should be noted here that the relevant texts require the Commission to seek the opinion of the Advisory Committee. However, if the opinion of the advisory body must be sought, the decision-making body remains free to comply or to ignore it.

The Judge-Rapporteur :

Youssef Any MAHAMAN

OPINION OF THE ADVOCATE GENERAL

Ababacar DIENG, a senior executive in charge of general administration, had been appointed Director of Administrative and Financial Affairs at the WAEMU Commission.

On 27 February 1997, following decision no. 97-046/SP/PC, the President of the Commission terminated his office. On 6 June 1997, he asked the WAEMU Court of Justice to annul this decision on the grounds, inter alia, that it violated the provisions of Articles 1 and 2 of Implementing Regulation No. 8/96/COM/WAEMU of 08/07/1996, in that it had been taken without the prior opinion of the Advisory Committee on Recruitment and Promotion.

The Court, endorsing this reasoning, annulled the decision in Ruling No. 3 of 29 May 1998.

Drawing the consequences of this annulment, the President of the WAEMU Commission, by Decision No. 298 of 31/07/1998, terminated the duties of Ababacar DIENG and awarded him compensation.

After this annulment, Ababacar DIENG, through his lawyer, Maître Mamadou SAVADOGO, again brought an action for compensation before the Court (full litigation), on the grounds that the compensation awarded, calculated by the Commission on the basis of the basic salary as at 28/02/1998, plus the housing allowance for the period from 01/03/1997 to 31/07/1998, did not fully cover the loss suffered by him, hence his claims:

- for non-material damage:CFAF	7,000,000
- for material damage:FCFA	31,891,695
Total:	38,891,695 FCFA

The defendant, the WAEMU Commission, through its lawyer, Mr Harouna SAWADOGO, replied and argued, as a matter of form, that the appeal was inadmissible on the grounds that the applicant had not lodged a prior administrative appeal, and on the merits, if necessary, of the dismissal of this appeal, on the grounds that Decision No. 97-046/SP/PC terminating the functions of Ababacar DIENG is not the source of an injurious act likely to give rise to a right to reparation by the award of damages.

The applicant did not respond to this statement of defence, which was duly served on him.

Without wishing to prejudge a debate on the merits of the case, I think it would be useful to discuss the formal pleas raised by the defendant concerning the absence of a prior administrative appeal.

The legal regime of the Community civil service is governed by Regulation n°01/95 of 1^{er} /08/1995 of the Council of Ministers on the Staff Regulations of Officials of the WAEMU. Under the terms of article 112 of this Regulation, an official's appeal is admissible only if :

- the Joint Consultative and Arbitration Committee (Comité Consultatif Paritaire et d'Arbitrage - CCPA) received a complaint from the official, enabling the appointing authority to bring about an amicable settlement of the dispute;
- and whether this complaint resulted in an explicit or implicit rejection decision by the appointing authority.

It has not been established that the claimant referred his complaint to the ACFA.

As the rules governing the admissibility of appeals in administrative matters are a matter of public policy, the absence of a prior administrative appeal must result in the inadmissibility of Ababacar DIENG's appeal.

It seems appropriate to me to remind the Court that it was in the name of this same principle of prior recourse that Mr Ababacar DIENG had, in his first dispute, lodged an ex gratia appeal with the President of the WAEMU Commission on 14/03/1997, which the latter rejected by letter No 97122/SP/PC of 19/05/1997.

Procedurally, as the application is manifestly inadmissible, the Court must be able to rule on it without further proceedings, pursuant to Article 78 of the Court's Rules of Procedure.

The Advocate General :

Malet DIAKITE

JUDGMENT OF THE COURT

26 January 2000

Between

Mr Dieng Ababacar

And

The WAEMU Commission

The Court, composed of Yves D. YEHOUESSI, President; Youssouf Any MAHAMAN, Judge-Rapporteur; Moctar MBACKE, Judge; Malet DIAKITE, Advocate General; Raphaël P. OUATTARA, Registrar;

delivers this judgment :

Considering that Mr Ababacar DIENG states that at the end of his probationary period, the President of the WAEMU Commission terminated his duties by Decision No. 97- 046/SP/PC of 27/02/1997;

Following his appeal for annulment dated 06/06/1997, the WAEMU Court of Justice, by judgment no. 3 of 29/05/1998, annulled the contested decision, as the legal formalities for his eviction had not been observed;

That drawing the consequences of the Court's ruling, the President of the WAEMU Commission terminated the duties of Mr Ababacar DIENG by Decision No. 238/98/PCOM of 31/07/1998, in compliance with the texts in force at the WAEMU;

That the same decision awarded him a special allowance corresponding, for each month of the period from 1^{er} March 1997 to 31 July 1998, to his basic salary plus housing allowance;

Whereas by application dated 1^{er} October 1998, registered at the Registry of the WAEMU Court of Justice on 2 October 1998 under No. 4, SCPA Conseil et Défense, acting on behalf of Mr Ababacar DIENG, brought an action seeking an order that the Court should order the WAEMU Commission to pay him the sum of thirty-eight million eight hundred and ninety-one thousand, six hundred and ninety-five (38.891.695) CFA francs as compensation for the damage allegedly caused to him by Decision No 97-046/SP/PC of 27/02/1997;

In support of his action, the applicant states that Decision No 97-046/SP/PC of 27/02/1997 caused him non-material and material damage by the fact that it was taken without the opinion of the Advisory Committee on Recruitment and Advancement; he adds that it has caused him to lose all chance of finding another job and has forced him into debt; he claims that the Court should order the Commission to compensate him for all the damage he has suffered;

Considering that, by submissions in its defence dated 28/04/1999, the WAEMU Commission, represented by Mr Alioune SENGHOR, Agent of the Commission, assisted by Mr Harouna SAWADOGO, Avocat à la Cour, asks the Court to declare the action brought by Mr Ababacar DIENG inadmissible as to form, for lack of a prior action and ill-founded as to substance;

Considering that the jurisdiction of the Court is enshrined in Articles 16 of Additional Protocol No. 1 relating to the supervisory bodies of the WAEMU, 27 of Additional Act No. 10/96 on the Statute of the Court of Justice of the WAEMU and 15, 5^e of the Rules of Procedure;

I. ON ADMISSIBILITY

Considering that the action brought by Mr DIENG seeks an order from the Court of Justice that the WAEMU Commission compensate him for the damage he allegedly suffered as a result of Decision No 97-046/SP/PC of 27 February 1997 which terminated his duties;

Considering that, in accordance with the provisions of Article 112 of Regulation No. 01/95/CM on the Staff Regulations of Officials of the WAEMU, it is specified that any recourse by a civil servant in the performance of his duties against the Union is subject to a

prior administrative appeal, the applicant points out that that provision concerns only officials of the Union, and that it cannot apply to him because he no longer has that status;

Considering that, without it being necessary to rule on the grounds of admissibility raised, it is important to emphasise that the fundamental condition for an appeal in administrative litigation is the existence of an implicit or explicit decision; that in the case in point, the WAEMU Commission, without waiting for a prior appeal from the applicant, took decision no. 238/98/P.COM of 31 July 1998 which, in Article 2, granted a special allowance to Mr DIENG, by way of regularisation following Judgment No. 3 of 29 May 1998 of the WAEMU Court of Justice annulling Decision No. 97-046/SP/PC of 27 February 1997;

Considering that, under these conditions, the Commission has rendered Mr Dieng's prior administrative appeal devoid of purpose and has thus linked the dispute; it is therefore appropriate to declare his appeal admissible;

II. ON REPAIRS

Considering that Mr DIENG claims, by way of compensation for his overall loss, the sum of 38,891,695 F. CFA. CFA (thirty eight million eight hundred and ninety one thousand six hundred and ninety one francs CFA) for various family allowances, contributions, unpaid pensions, loss of opportunity, reimbursement of bank debit balance, lawyers' fees, etc.

Considering that it should be specified that the loss suffered by Mr DIENG occurred between the date of his final dismissal, i.e. 31 July 1998, and the date of the judgment annulling his first dismissal on 27 February 1997, with retroactive effect from the latter date;

Considering that the prejudice suffered during this period when Mr DIENG neither provided proof of service nor received a salary, cannot be reflected in salary benefits, but must be assessed in the form of lump-sum compensation. However, account must be taken not only of the fact that the annulment decision on which he bases his loss was motivated exclusively by a formal defect, but also of the fact that his definitive dismissal

after regularisation on 31 July 1998, left unchanged the grievances against him, namely the alleged professional shortcomings at the end of his probationary period;

Considering therefore that Mr DIENG contributed to the prejudice suffered in that he was constantly reproached for the professional shortcomings mentioned in the final decision to dismiss him;

Considering, in short, that the assessment of this loss compared to the allowances made to him by the Commission clearly shows a fairly large compensation to the detriment of the Commission between the sum of 13,717,300 F. CFA paid to him by the Commission and the loss actually suffered, taking into account the above-mentioned considerations;

In view of the compensation between the loss suffered and the sum awarded by the WAEMU Commission, there is no reason to order the Commission to pay any additional compensation;

Whereas, in accordance with Article 60(2) of the Rules of Procedure of the Court of Justice of the WAEMU, any unsuccessful party shall be ordered to pay the costs; Mr Ababacar DIENG's application having been dismissed, he should be ordered to pay the costs;

FOR THESE REASONS

In form

Declares Mr Ababacar DIENG's claim for damages admissible;

At the back

- Holds that there are no grounds for ordering the Commission to pay additional compensation;

- Order Mr Ababacar DIENG to pay the costs.