

Case n° 03/98

Dieng Ababacar

against

WAEMU Commission

"Civil servant - Action for annulment

Summary of the
judgment

1. Community civil service law - Action for annulment - Omission of a substantial formality.

Failure by the Chairman of the Commission to consult the Advisory Committee on Recruitment and Promotion before taking a decision to terminate a member of staff's service.

2. The appointing authority's obligation to consult the CCRA prior to taking decisions falling within its remit constitutes a substantial formality, the omission of which renders the act in question null and void.

*

REPORT BY THE JUDGE-RAPPORTEUR

By application dated 6 June 1997, registered at the Registry of the WAEMU Court of Justice on 9 June 1997 under No 005/97, Maître Mamadou SAVADOGO, Avocat à la Cour, 01 BP. 6942 - Ouagadougou, acting on behalf of Mr Ababacar DIENG, brought an action before the Court seeking the annulment of Decision No 97-046/SP/PC of 27 February 1997 by which the President of the WAEMU Commission terminated his office.

Mr Ababacar Dieng was recruited as a senior official in charge of general administration by Decision No. 26/96/P.COM dated 19 February 1996. By letter No. 97-046/SP/PC dated 27 February 1997, he was informed that, in application of Article 29, paragraph 2, of the WAEMU Staff Regulations, his duties would be terminated on 28 February 1997.

It is common ground that, in accordance with the provisions of Article 112 of the WAEMU Staff Regulations, an appeal is only validly lodged with the Court if the Joint Consultative Committee has previously received a complaint from the person concerned.

For his part, the claimant sent an informal appeal directly to the President of the Commission by letter dated 14 March 1997, asking him to reconsider his decision.

By letter No 97-122/SP/PC of 19 May 1997, the President rejected Mr DIENG's request.

It was only after this prior informal appeal that the applicant referred the matter to the Court.

The problem arises as to the admissibility of the request insofar as the texts in force provide for prior referral to the Joint Consultative Arbitration Committee, which is competent to deal with the amicable settlement of any dispute that may arise between the Union and one of its officials.

Can the fact that the applicant has referred the matter directly to the President of the Commission, asking him to withdraw or amend the decision to dismiss him, replace the need to refer the matter to the Joint Consultative Arbitration Committee beforehand?

The Commission did not raise the issue of the request being inadmissible because it had not adopted the implementing provisions for the Staff Regulations defining the composition and operation of the Joint Arbitration Advisory Committee.

ON THE BACKGROUND

The applicant considers that Decision No 97-046/SP/PC dated 17 February 1997 of the President of the WAEMU Commission terminating his appointment is liable to annulment because it was taken in breach of Implementing Regulation No 05/96/Com/UEMOA fixing the duration of the probationary period prior to the definitive appointment of WAEMU officials, and Regulation No 8/96/COM/UEMOA laying down the composition and operating rules of the Advisory Committee on Recruitment and Promotion of the UEMOA.

First plea in law alleging infringement of Article 2 of Implementing Regulation No 05/96/COM/WAEMU

The applicant considers that the President of the Commission made a discretionary assessment of his performance without any evaluation file, in disregard of the provisions of Article 2 of Implementing Regulation No. 05/96/COM/WAEMU.

To demonstrate that Mr. Dieng's assertion is inaccurate, Mr. Alioune Senghor for the WAEMU Commission submits to the case file an evaluation form containing the rating and assessments made of the person concerned.

The aforementioned Implementing Regulation No. 05 lays down the length of the probationary period prior to the permanent appointment of WAEMU officials. Article 2 provides that: *"At the end of the probationary period, the official's performance shall be assessed.*

On the basis of the appraisal file, together with the marks and assessments of the official's hierarchical superiors, the Chairman of the Commission shall take either a decision confirming the official's appointment or a decision extending the probationary period.

probationary period of a further 12 months or a maximum of 6 months, depending on the case, or a decision terminating the service of the person concerned".

The appraisal file must be complete and reflect an effective and reasonable assessment of all the professional activity of the person concerned. They must be judged on their results and intellectual and professional abilities by their hierarchical superiors.

The assessment form in the file takes into account all of Mr Dieng's activities, in particular his attendance and punctuality, professional knowledge, sense of organisation and responsibility, dress and behaviour, and efficiency, and awards him a mark of 8/20 before concluding that he has not shown a disposition commensurate with the responsibilities entrusted to him.

But this assessment seems to be the work of the President of the Commission alone. If Mr Ababacar Dieng, who was Director of Administrative and Financial Affairs, had other superiors in the course of his work than the President of the Commission, it would have been desirable for his work to have been assessed by them too. And the existence in the file of a letter n° 97/007/SP/PC from the President of the Commission dated 27 January 1997 asking the Commissioner in charge of the Financial Policies Department to send him the evaluation (marks and assessments) of the officials placed under his authority, clearly shows that Mr Ababacar DIENG works under the control of other superiors. It is just as natural that the file should have contained the assessment of his work by the Financial Controller who, moreover, supervised the handover between Mr DIENG and Mrs TRAORE.

Refusal to hire is theoretically unrestricted, but it cannot be accepted that the decision is based on accusations that have not been established by an impartial and thorough investigation.

The second plea alleging infringement of Implementing Regulation No 08/96/COM/WAEMU, in that the contested decision was taken without the opinion of the Advisory Committee on Recruitment and Advancement.

The Commission's representative considers that it was impossible, beyond the control of the competent authority, to comply with the prescribed procedure because, on the one hand, at the end of the applicant's probationary period, all the members of the Committee were also at the end of their probationary period. On the other hand, he maintained that, since the Committee had not been consulted at the time of recruitment, even though Article 26 of the Staff Regulations so prescribed, it was permissible not to consult it at the end of the probationary period.

That the opinion issued by the members of the Commission could validly replace that of the Committee. Finally, he maintained that the communication of the file to the official was not provided for in the case in point, since it was not a disciplinary procedure.

UEMOA recognises that the opinion of the Advisory Committee must be sought for its decision. This Committee was set up by implementing regulation no. 08/96/COM&OEMOA dated 8 July 1996. The argument that it was impossible to request the opinion of this Committee because all its members were also at the end of their probationary period does not hold water. For as soon as the Committee existed, there was no impediment making it impossible for it to meet.

It is clear from the composition of the Committee that the applicant, the Director of Administrative and Financial Affairs, is a member; it is simply a matter of stipulating that he will not take part in the deliberations on his case.

As for the argument that, as the opinion of the Advisory Committee was not sought at the time of the applicant's recruitment, it could be disregarded at the end of the probationary period. In his reply, Mr DIENG Ababacar pointed out that the fact that the law had been violated at the time of recruitment did not authorise the Commission to violate it at the time of dismissal.

In any event, it is settled case law that when a decision can only be taken by the competent authority after receiving the opinion of a collegiate body, the failure to consult or the irregularity of the consultation vitiates the legality of the decision.

Finally, the Commission, represented by Mr Alioune Senghor, points out that neither the Staff Regulations nor implementing regulations 05/96 and 08/96 provide for the file to be communicated to the official only in the event of disciplinary proceedings.

But can a person be harmed by an individual decision without first having been able to discuss the reasons for that decision? This would be the very negation of the rights of defence that apply to any individual decision that is unfavourable or derogates from the general rules. The Staff Regulations not only extend the scope of the rights of the defence, but also provide for a genuine dialogue before any action is taken.

The Judge-Rapporteur :

Youssef ANY MAHAMAN

OPINION OF THE ADVOCATE GENERAL

Ababacar DIENG was recruited by the UEMOA Commission as a senior executive in charge of General Administration in the UEMOA services by decision n°28 of 19 February 1996 of the President of this Commission, then appointed Administrative and Financial Director. He was subject to a one-year probationary period. On 27 February 1997, by decision no. 97-046/SP/PC, the President of the WAEMU Commission terminated his appointment, on the grounds that he had not shown a disposition commensurate with the responsibilities entrusted to him.

By letter dated 14 March 1997, he lodged an informal appeal with the Chairman of the Commission, who rejected it by letter no. 97-122/SPPC dated 19 May 1997.

As a result, Ababacar brought the case before the Court. He paid the bond (20,000 CFA francs). His appeal is in order.

In his application, Ababacar sought the annulment of Decision No 97-046/SP/PC of 27 February 1997 of the President of the WAEMU Commission, on the grounds that it violates :

1. The provisions of Implementing Regulations No 05/96-COM/UEMOA of 1 February 1996 laying down the length of the probationary period, in that it was not based on an assessment file with notes and assessments by the hierarchical superiors of the person concerned, of which the latter was unaware and whose performance was assessed in a discretionary manner, and in that, moreover, the incompetence of Ababacar, who drew up the activity report for his department adopted by the UEMOA, is not reported.
2. Implementing Regulation No 08/96/COM/UEMOA of 8 July 1996 of the WAEMU Commission, laying down the composition and operating rules of the WAEMU Advisory Committee on Recruitment and Advancement (C.C.R.A.), in that the President of the Commission did not first request the opinion of the C.C.R.A. before terminating the duties; that the argument based on the fact that this Committee did not in fact exist at the time of the end of the probationary period cannot prosper.

The WAEMU Commission, represented by its agent, Alioune Senghor, in its statement of defence of 24 July 1997, claims that the contested decision was based on the appraisal sheet containing both the staff member's mark and the assessments, and that the implementing regulations in question do not provide for the file to be communicated to the staff member or for him or her to be heard by the Advisory Committee, except in disciplinary matters.

The Commission acknowledges, however, that all the members of the Permanent and Non-Permanent Committees of the C.C.R.A. were also at the end of their probationary period, which, it says, made it de facto impossible to comply with the procedure laid down in Implementing Regulation No 08/96/COM/WAEMU.

PLEAS IN LAW RAISED ON THE MERITS

Under the terms of article 29 paragraph 2 of the WAEMU Staff Regulations, the competent authority, at the end of the probationary period, shall decide whether or not to admit the person concerned as an official of the Union and shall notify the person concerned of its decision in writing, and establishment may not take place until the Advisory Committee on Recruitment and Promotion has given its prior advisory opinion in accordance with the provisions of article 1^{er} of implementing regulation n° 0 8/96/COM/UEMOA of 8 July 1996.

The WAEMU Commission claims that it was unable to set up this Committee because the people who were to make up the Committee were on probation and that it had to make up for this by having recourse to an ad hoc Committee.

In so doing, it manifestly circumvented the provisions of Articles 1 and 2 of Implementing Regulation No 8, and its decision is unlawful as being vitiated as a matter of form.

It follows that Decision No 97-046/SP/PC of 17 February 1997 of the President of the WAEMU Commission should be annulled as defective in form, pursuant to Article 9 of Additional Protocol No 1.

The Advocate General :

MALET DIAKITE

JUDGMENT OF THE COURT

29 May 1998

Between

Mr Dieng Ababacar

And

The WAEMU Commission

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

delivers this judgment :

Whereas by application dated 6 June 1997, registered at the Registry of the WAEMU Court of Justice on 9 June 1997 under No. 05/97, Maître Mamadou SAVADOGO, Avocat à la Cour de Ouagadougou (Burkina Faso), acting on behalf of Mr DIENG Ababacar, brought an action for the annulment of Decision No. 97-046/SP/PC of 27 February 1997 by which the President of the WAEMU Commission terminated his office;

He states that, having been recruited to WAEMU as a senior executive in charge of general administration by decision of 19 February 1996 of the President of the Commission, he was to be established after a probationary period of twelve months if his performance was deemed satisfactory;

A few months after starting his traineeship, he was appointed Director of Administrative and Financial Affairs by Decision No 107/96/P/COM of the President of the Commission;

That on 27 February 1997, by letter No 97-048/SP/PC from the President of the Commission, he was notified that his probationary period had come to an end and that his duties had been terminated, his performance having been judged unsatisfactory;

That on 14 March 1997, he lodged an informal appeal with the President of the Commission, which was rejected; that he therefore referred the matter to the WAEMU Court of Justice for a ruling:

1. Annul the decision of the President of the Commission of 27 February 1997 terminating his duties;
2. Restore the case and the parties to the position they were in prior to the decision;

In support of his action, the applicant claims that the contested decision is vitiated by illegality;

On the one hand, he argues that the decision to appoint or dismiss a probationer is taken in principle on the basis of an assessment file with notes and assessments by the hierarchical superiors of the person concerned, as is clear from the terms of Article 2 of Implementing Regulation No 5/96/COM/WAEMU laying down the length of the probationary period;

That this assessment file does not appear to have been compiled;

That this decision was taken without the opinion of the UEMOA Advisory Committee on Recruitment and Promotion;

Considering that, in reply to these pleas, the defendant has placed on the record of the proceedings an assessment form containing the staff report and the assessments made of the person concerned by the President of the Commission, in order to maintain that the assessment was carried out, but that the failure to consult the Advisory Committee on Recruitment and Promotion was due to the fact that it was impossible to convene that body, insofar as the members were all at the end of their probationary period, which led the President to consult the Members of the WAEMU Commission;

Considering that the applicant replied to these rebuttals on 27 August 1997, stating that Article 2 of Regulation No 5/96 requires the President of the Commission to take his decision on the basis of an assessment file accompanied by notes and assessments from the hierarchical superiors of the person concerned; that the sheet placed in the file cannot replace the assessment file as provided for in the aforementioned article;

Moreover, the assessment file was never brought to its attention;

As regards the argument that it was impossible to convene the Advisory Committee on Recruitment and Advancement, the applicant considers that it is inoperative, since its non-existence had the consequence of preventing the President from taking a dismissal measure at the risk of infringing the institution's regulatory provisions;

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

Considering that the Court's jurisdiction in this case is enshrined in Article 16 of Additional Protocol No. 1 on the supervisory bodies of the WAEMU and Article 112 of Regulation No. 1/95/CM of 1^{er} August 1995 on the Staff Regulations of Officials of the WAEMU and requires no particular comment;

As regards the admissibility of the action, it should first be noted that :

- that the application has been submitted in accordance with Article 26 of the Rules of Procedure;
- that the applicant fulfilled the bond obligation on 12 June 1997;

As regards time limits, the file shows that :

1. As the contested decision was dated 27 February 1997 and notified on the same day, the applicant lodged an informal appeal on 14 March 1997, i.e. well before the expiry of the two-month time limit for contentious appeal, which had the effect of suspending the time limit and only restarting it on 19 May 1997, the date on which he was notified of the rejection of his informal appeal;

2. that the application, which was registered at the Court Registry on 9 June 1997, is within the prescribed period;

In view of the foregoing, Mr Dieng Ababacar's appeal must be declared admissible in form;

Whereas, on the substance, the Court is called upon to answer the following questions

1. Does the assessment report drawn up by the President of the Commission on the activities of DIENG Ababacar comply with the requirements of Article 2 of the above-mentioned implementing regulation No 5/96?
2. Does the failure of the Chairman of the Commission to consult the Advisory Committee on Recruitment and Advancement before taking the contested decision constitute a procedural defect such as to render the decision null and void?

To this end, it is important to specify that the legal framework of this case is defined by Article 33(2) of the WAEMU Treaty, which confers the power of appointment to posts in the Union on the President of the Commission, Articles 17, 18 and 29 of the WAEMU Staff Regulations, Implementing Regulation No 5/96 laying down the length and conditions of the probationary period and Implementing Regulation No 8/96 laying down the composition and functioning of the CCRA;

Considering that, as regards the plea that the appraisal sheet does not comply with the requirements of Article 2 of Implementing Regulation No. 5, it should be specified that an appraisal file must be complete and reflect an effective and reasonable assessment of the professional activity of the person concerned, who must in fact be judged by his hierarchical superiors on the basis of his results, his intellectual and professional abilities;

That in the present case, the assessment form in the file took into account all of Mr DIENG's activity, in particular his regularity and punctuality, professional knowledge, sense of organisation and responsibility, dress and behaviour, in order to award him

a mark of 8/20 before concluding that he had not shown a disposition commensurate with the duties entrusted to him;

Since, by virtue of his duties as Administrative and Financial Director, he is placed under the direct authority of the President of the Commission, Mr Dieng has no grounds for claiming that this assessment is erroneous;

That it is therefore appropriate to reject this first plea as inoperative;

Considering that, as regards the plea that the CCRA was not consulted, it should be pointed out that a procedural defect generally consists of a breach of the rules relating to the drafting of a unilateral administrative act, which is lawful only if the legal formalities for its enactment have been observed by its author;

Administrative jurisdictions, both national and international, consider the formality to be substantial, i.e. likely to influence the decision to be taken because of the guarantees it is supposed to offer. This is the case when the formality is provided for in the interests of citizens or officials. Failure to comply with the formality will, in principle, render the act null and void;

Considering that in the present case, consultation of the CCRA, as formally instituted by Article 18 of the Staff Regulations of Officials of the WAEMU, was required of the President of the Commission before the decision in question was taken; that it does not appear that he contested it, having confined himself to invoking the impossibility of doing so;

Considering moreover that the CCRA having been instituted and its role laid down by the WAEMU Staff Regulations, the legislator intended to place it on the same footing as the other statutory guarantees offered to civil servants; that it follows from this that the obligation imposed on the appointing authority to consult it prior to decisions falling within its remit constitutes a substantial formality, the omission of which entails the nullity of the act concerned;

Considering that the alleged de facto impossibility is not due to the non-existence of the Committee, nor to the fact that it was not possible to bring its members together; that the Chairman of the Commission deliberately chose not to consult it; that the argument based on the fact that the Committee did not exist was not based on the fact that it was not possible to bring its members together.

of the trainees of the members of the Committee is inoperative insofar as the Commission which adopted the implementing regulations was not unaware of this state of affairs; and that it did not take any transitional measures to remedy the situation;

It follows from the foregoing that the contested decision must be set aside on this ground;

FOR THESE REASONS

Ruling publicly and adversely in Community civil service matters :

- Receives the application of Mr DIENG Ababacar ;
- Annuls Decision No 97-046/SP/PC of 27 February 1997 ;
- Orders UEMOA to pay the costs.

