

**Case n° 02/98**

**Sacko Abdourahmane**

**against**

**WAEMU Commission**

"Civil servant - Actions for annulment and reinstatement

Summary of the judgment

*1. Community civil service law - Actions for annulment, reinstatement and compensation - Partial dismissal.*

*New submissions in extension of initial submissions - Inadmissibility.*

*2. Failure by the Chairman of the Commission to consult the Advisory Committee on Recruitment and Advancement before taking the contested decision. Omission of a substantial formality - Annulment.*

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1. Neither its statutes nor its rules of procedure confer on the Court the power to order, in the event of annulment of the contested decision, the reinstatement of and/or financial compensation for the official dismissed by the Commission.

Like some international courts, the Court does not have the power to order measures in place of reinstatement.

It cannot be validly seised of an action relating only to a possible act.

2. The failure of the Chairman of the Commission to consult the Advisory Committee on Recruitment and Advancement (ACRA) before taking the contested decision constitutes a procedural defect that renders the decision null and void.

Failure to comply with an essential formality will, in principle, render the deed null and void.

## **REPORT BY THE JUDGE-RAPPORTEUR**

By application dated 25 April 1997, registered at the Registry of the WAEMU Court of Justice on 7 May 1997 under no. 64, Mr SACKO Abdourahmane, through his counsel, Antoinette OUEDRAOGO, Avocat à la Cour de Ouagadougou (Burkina Faso), brought an action for annulment of Decision No 97-O48/SP/PC of 27 February 1997 by which the President of the WAEMU Commission terminated his duties with the said Commission at the end of his probationary period.

### **I. THE FACTS OF THE CASE**

As set out by the applicant and not contested by the respondent, they are as follows:

Mr SACKO was recruited by UEMOA as a Senior Executive classified at step 10 of Grade B2 by Decision of 19/02/1996 of the President of the Commission. He was to be established after a probationary period of twelve (12) months if, at the end of this period, his performance was deemed satisfactory.

This internship effectively began on 1 March 1996; eight (8) months later, on 24 October 1996, Mr SACKO was appointed Head of the Communication and Documentation Division by Decision No. 109/96/P.Com of the President of the Commission.

On 27 February 1997, by letter no. 97-048/SP/PC from the President of the Commission, he was notified that his probationary period was coming to an end and that he would be relieved of his duties with effect from 28 February 1997, as his performance had not been deemed satisfactory.

On 2 April 1997, Mr SACKO lodged an informal appeal with the President of the Commission, which was unsuccessful. He then referred the matter to the Court, asking it to :

1. annul the decision of the President of the Commission of 27 February 1997 terminating his office;

2. order his reinstatement in the Commission's services as Head of the Communication and Documentation Department with all the legal consequences;
3. order the Commission to pay the costs.

The action was notified on 26 June 1997 to the President of the Commission who, by letter No 97-126/PC/CJ of 1 July 1997, informed the Court of the appointment of Mr Alioune SENGHOR, Legal Adviser of the Commission, as Agent of the Commission.

## **II. PLEAS PUT FORWARD BY THE PARTIES**

The applicant submits that the contested decision is vitiated by unlawfulness of both form and substance.

1. On the form, he argues on the one hand that the decision to appoint or dismiss a probationer is taken in principle after a detailed report, as is clear from the terms of Article 2 of Implementing Regulation No. 5/96/CDM/WAEMU setting the length of the probationary period and stating that "on the basis of the evaluation file together with the notes and assessments of the hierarchical superiors of the person concerned, the President of the Commission shall take either a decision confirming the appointment, ... or a decision terminating the duties of the person concerned".. or a decision terminating the employment of the person concerned"; apparently, this assessment file was not compiled.

That, on the other hand, this decision must be preceded by consultation of the WAEMU Advisory Committee on Recruitment and Promotion, instituted by Article 18 of Regulation No. 1/95 on the Staff Regulations of WAEMU Officials; that, in the present case, this Committee was not consulted.

2. On the merits, the applicant considers that the decision complained of was taken on the basis of a manifest error of assessment insofar as, since his recruitment, he has spared no effort to carry out the tasks entrusted to him; that he has never been the subject of any letter of observation, reproach or sanction from his hierarchical superiors; that, on the contrary, his performance appears to have been good.

He was appointed Head of the Communication and Documentation Division eight (8) months after the start of his internship.

Against these pleas, the defendant argued that :

1. As regards the form, the assessment of the applicant was indeed carried out, the proof being a form attached to the pleading, containing both the applicant's staff report and the assessments of his hierarchical superiors; as for the failure to consult the Advisory Committee on Recruitment and Promotion, this was due to the de facto impossibility of convening a meeting of this body insofar as all of its permanent and non-permanent members were themselves at the end of their probationary period, which led the Chairman to consult the members of the Commission instead, whom he convened for this purpose.
2. On the substance, the conditions for the legality of the decision were met, the President having complied with the requirements of Article 29 of the Staff Regulations and those of Implementing Regulation No 5/96 of 1 February 1996; that this was the case for all officials of the Union.

In response to these rebuttals, the applicant replied on 29 August 1997, stating that the argument based on the de facto impossibility of convening a meeting of the C.C.R.A. could not be accepted since, when the members of the said Committee were appointed, the Commission was aware that they would be at the end of their probationary period at the same time as the officials whose files they would have to examine. In any event, in the absence of a text, the Commission cannot be substituted for the C.C.R.A., as the two bodies have different responsibilities and do not offer the same guarantees of impartiality.

As regards the merits, the assessment form used as a basis for the contested decision presents the applicant as a member of staff "lacking initiative and incapable of making concrete and coherent proposals in his field of competence", whereas throughout his probationary period he constantly took the initiative and made concrete proposals for action:

- programme proposal ;
- a detailed communication programme comprising a series of short-, medium- and long-term actions with precise objectives;
- proposing specific actions.

That all this has remained unresolved despite his reminders.

Despite this, he realised :

- a weekly press review for staff ;
- press briefings and articles.

That his hierarchical superiors, who were the Director of the General Secretariat, himself a trainee, and the Chairman of the Commission, did not guide, advise or encourage him during his traineeship, as was their duty. His work was therefore judged without objectivity.

The claimant added to his initial submissions that, failing reinstatement, the defendant should be ordered to pay him the sum of ten million francs (10,000,000 F) in damages.

In a rejoinder dated 30 September 1997, the defendant argued that consultation of the College of Commissioners in this case offered greater guarantees of impartiality, since the Commissioners were in a better position than anyone else to assess their agents. In addition, they had solemnly sworn to carry out their duties with complete independence and impartiality.

As regards the assessment of the applicant's services, it should be remembered that, although the applicant was attached to the Secretariat Directorate, he reported directly to the President of the Commission for most of his work; there can therefore be no error of assessment.

Later, and with the authorisation of the President of the Court with reference to Rule 31 of the Rules of Procedure, the applicant submitted an additional pleading dated 30 March 1998 in which he increased the sum he claimed in damages to seventy million francs (FRF 70,000,000) on the ground that his loss had been aggravated by the fact that he was still unemployed, his former employer having refused to reinstate him on the ground that he had been seconded for a period of five years.

He goes on to explain that the reason he was led to ask for such a long secondment was that he was convinced at the time that he would have a long career at WAEMU, given that the letter of recruitment he received at the time of his recruitment did not include the condition of a prior probationary period.

He also searched in vain for a new job, as potential employers were waiting to be informed of the real reasons for his dismissal.

The defendant, who had evaded this head of the applicant's claim in his earlier pleadings, replied on 15 April 1998, stating that, as the Court had been seised principally of an application for annulment, it could not be asked to make an order for damages against the author of the contested act, or any other injunction. That this case falls within the scope of litigation on legality, in which the judge's power consists exclusively in assessing whether the act complies with the law and, depending on the case, in finding that it is valid or annulling it in whole or in part; that this head of claim should therefore be declared inadmissible.

That if, however, the Court were to decide otherwise, it would easily find that the merits of the case were dismissed; that, in fact, the argument put forward by the applicant to the effect that he had not been informed at the time of his recruitment that he would be subject to a probationary period is inoperative insofar as the letter sent to him specifying the conditions of his recruitment clearly indicated that his appointment would be made in accordance with the provisions of Regulation No 01/95/CM on the status of WAEMU civil servants; Article 29 of this regulation unambiguously states this obligation; as a moderately prudent person, the applicant should have taken cognisance of these provisions before requesting his secondment, the present consequences of which cannot be attributed to WAEMU.

3. In the light of the foregoing, the Court will first have to 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 after having determined the questions which it is called upon to answer and the legal framework of the case.
- 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 August 1995 on the Staff Regulations of Officials of the WAEMU and therefore requires no specific comment.
  - As to **the admissibility** of the action, the Court will have to examine :
    - whether the application complies with the requirements of article 26 of the Rules of Procedure regarding its presentation and the security.
    - compliance with the time limit stipulated in Article 15 of the Rules of Procedure and reproduced in Article 112 of the WAEMU Staff Regulations.

The compliance of the application with the requirements of Article 26 of the Rules of Procedure calls for no particular comment, as the applicant met all the formal requirements for submitting the application and fulfilled the security obligation on 2 June 1997.

With regard to deadlines, it should be noted that :

1. As the contested decision was dated 27 February 1997 and the applicant was notified of it on the same day, he had until 28 April to refer the matter to the Court. Instead, he lodged an application for an injunction on 2 April, i.e. 26 days before the expiry of the time-limit for bringing an action, the effect of which was to suspend the time-limit, which did not start to run again until 7 April 1997, the date on which the applicant was notified of the rejection of his application for an injunction;
2. the present action having been registered at the Court Registry on 7 May 1997, Mr SACKO is well within the prescribed time-limit.



In view of the foregoing, Mr SACKO's action as initially brought must be declared admissible in form.

On the other hand, with regard to the part of the applicant's submissions seeking an order that the defendant pay him the sum of 10,000,000 F, subsequently increased to 70,000,000 F in the absence of his reinstatement, the Court will have to determine its exact nature in order to be able to assess its admissibility. If it is a new claim, it will have to declare it inadmissible in that it was belatedly submitted on 29 August 1997, well after the expiry of the time limit for bringing an action on 7 June 1997.

If, on the other hand, it appears to be a simple extension of the initial submissions, the problem of admissibility no longer arises; the difficulty of assessment lies in the fact that, on the one hand, this head of claim is presented in suppletive form, giving rise to the assumption of a connection based on the suggested relationship of equivalence between reinstatement and compensation, and that, on the other hand, it introduces de facto, indirectly and implicitly, an action for liability against the defendant, which may appear to be a new dispute brought before the Court, since this action can only be brought on a different legal ground from that of the initial submissions.

- On **the substance**, and with regard to the claims for annulment, the Court must answer the following questions, it being understood that an affirmative answer to the first question obviates the need to answer the second:

1. Does the failure of the Chairman of the Commission to consult the Advisory Committee on Recruitment and Advancement (C.C.R.A.) before taking the contested decision constitute a procedural defect such as to render the decision null and void?
2. Was the contested decision based on a manifest error of assessment by the applicant's departments?

To this end, it is necessary to specify the legal framework of this case, which consists of :

- Article 33(2) of the WAEMU Treaty, which confers the power of appointment to Union posts on the President of the Commission, and Article 17 of the Staff Regulations of Officials of the Union, which refers to this;
- articles 18 and 29 relating respectively to the establishment of an Advisory Committee on Recruitment and Promotion and the compulsory probationary period prior to the establishment of WAEMU civil servants;
- Implementing Regulation No 5/96 laying down the length and conditions of the probationary period ;
- Implementing Regulation No 8/96 laying down the composition and operation of the C.C.R.A.

It should also be pointed out that the legal regime for WAEMU civil servants owes a great deal to those of our national civil services, which were themselves largely inspired by the French civil service, the principles of which the Member States of the Union, with the exception of Guinea Bissau, have appropriated as a legacy of written reason.

This is why, in addition to the legal framework set out above, the analysis of the questions raised may be based on French-language or French-inspired doctrine and case law, as well as on the case law of international administrative tribunals on the subject, and in particular that of the Court of Justice of the European Communities, which has strong similarities in substance with French civil service litigation.

Having said that, it is important, when considering the first question, to remember that a procedural defect generally consists of a breach of the rules governing the drafting of a unilateral administrative act, which is lawful only if the legal formalities for its enactment have been observed by its author.

Both national and international administrative courts examine pleas of procedural irregularity on the basis of the following elements of the formality in question:

1. Is the formality concerned prescribed by law or not?

- if it is not, it is considered optional and is not binding on the administrative authority ;
- if it is, then performing it is obligatory.

2. When a formality is mandatory, it may or may not be substantial.

A formality is said to be substantial when it is likely to have an influence on the decision to be taken because of the guarantees it is supposed to offer; in particular, formalities provided for in the interests of citizens or employees are considered to be substantial, and failure to observe them will in principle result in the act being null and void.

On the other hand, where the omission of a formality is not substantial, it is not sufficient on its own to render the act null and void; this is the case for formalities that are said to have been provided for in the interests of the administration itself or of the body in the process of taking decisions or measures of an internal nature.

In the light of the foregoing, it may be held in the present case that consultation of the Advisory Committee on Recruitment and Promotion, formally instituted by Article 18 of the Staff Regulations of Officials of the WAEMU, the composition and operation of which were specified by Implementing Regulation No 8/96/CM of 8 July 1996, was required of the President of the Commission before he took the decision complained of; but then, can that formality be regarded as substantial as the applicant maintains? It does not appear from the defendant's pleadings that the defendant contested this, since he merely claimed that it was de facto impossible to carry out the consultation. Nonetheless, the Court must make its own assessment of this element of the question, as well as of the factual impossibility invoked by the defendant, if any.

As regards consultation of the College of Commissioners instead of the C.C.R.A., unless the Court decides otherwise, it is clear from legal doctrine and settled case law from a variety of sources that when the author of an act is required, prior to its enactment, to seek the opinion of a body specially created for that purpose, he does not have the possibility of consulting other bodies instead, even if they have a similar composition.

With regard to the second question, it seems necessary to remember that while in principle the court is called upon to judge the legality of administrative action, it does not authorise itself to assess the appropriateness of such action. At most, he can check whether the legal conditions of the act in question have been met.

In the present case, the President of the Commission is accused of having committed a manifest error in his assessment of the applicant's services. The central point on which the defendant relied was that no assessment file had been compiled, contrary to the requirements of Article 2 of Implementing Regulation No 5/96/CDM. To refute this allegation, the defendant produced an assessment form containing the assessments and marks of the applicant's hierarchical superiors.

Article 33 of the WAEMU Treaty states that "the President of the Commission shall determine the organisation chart of the services ... he shall appoint to the various posts".

Article 18 of the Staff Regulations adds that recruitment must be directed to securing for the Union the services of officials of the highest standard of ability, efficiency and integrity.

A reading of the provisions of these two articles shows that even though the Commission has set up an Advisory Committee on Recruitment and Promotion

"Although this does not imply immunity from jurisdiction, because it must be exercised solely in the interests of the Union, it cannot be subject to total review by the court, which is not required to take the place of the administrative authority. The court must confine itself to verifying whether the assessment which determined the decision in question was based on facts which were materially inaccurate or incomplete or on an error of law. Under no circumstances may he make a value judgement on the subjective elements that this assessment necessarily includes in its discretionary aspect.

In the present case, the applicant complained that the President of the Commission had wrongly assessed his services, since throughout the probationary period he was never observed or reproached; on the contrary, eight months after the start of his probationary period, he was appointed head of division.

He produced a series of documents attesting to the work carried out during this period.

The defendant merely asserted that the number of actions carried out was not sufficient to establish the alleged error of assessment, without giving any indication of how the applicant's performance did not correspond to what was expected of him.

As the matter stands, the Court may ask the Commission during the oral procedure for the terms of reference of the work that the applicant was required to perform during the period in question, in order to establish its belief as to the material accuracy of the facts on which the decision in question was based.

**The Judge-Rapporteur :**

**Martin Dobo ZONOU**

## **OPINION OF THE ADVOCATE GENERAL**

Abdrahmane SACKO, a journalist by profession, was recruited by the WAEMU Commission as a Senior Communication Officer, pursuant to Decision No. 40/96 of 19 February 1996 of the President of the Commission, and was appointed Head of the Communication and Documentation Division on 24 October 1998. He took up his duties on 1<sup>er</sup> March 1996 and is subject to a one-year probationary period.

On 27 February 1997, by decision no. 97-048/SP/PC, the President of the Commission dismissed him on the grounds that, at the end of the probationary period, his performance had not been satisfactory.

On 2 April 1997, Abdrahmane lodged an informal appeal with the President of the Commission, which was rejected on 7 April 1997. He then challenged the decision before the Court of Justice and, in substance, requested in the introductory application that it be annulled and that he be reinstated in the services of the WAEMU; he subsequently amended the subject of that application in his reply of 29 August 1997 and, in the alternative, requested that the Commission be ordered to pay him 10,000,000 CFA francs in damages, increased to 70,000,000 CFA francs. CFA in damages, increased to 70,000,000 F. CFA by supplementary statement dated 30 March 1998.

### **THE LEGALITY OF THE ACTION**

The preliminary administrative appeal (recours gracieux) having been exhausted on 7 April 1997, Abdrahmane applied to the Court (application registered in the Registry under no. 64 of 7 May 1997). He paid the bond on 2 June 1997.

The parties have filed pleadings in accordance with the provisions of Articles 29 and 30 of the Rules of Procedure. The appeal is therefore regular in form.

## **GROUND OF APPEAL AGAINST DECISION NO. 97-048/SP/PC :**

The applicant argues that the decision is vitiated by illegality in both form and substance.

- **Form:**

In that the decision was not based on any assessment file together with the notes and assessments of his hierarchical superiors, and that it was not preceded by any consultation of the UEMOA Consultative Committee on Recruitment and Advancement (C.C.R.A.), in breach of Article 2 of Implementing Regulation No 05/96- COM/UEMOA of 1<sup>er</sup> February 1996 and of Article 18 of Regulation No 01/95 on the Staff Regulations of Officials of the UEMOA.

- **Substance:**

The applicant alleged that the decision was the result of a manifest error of assessment insofar as he had not been the subject of any reproach or sanction from his hierarchical superiors and even though he had been appointed Director of Communication and Documentation eight months after the start of his probationary period.

Against these arguments, the Commission, through its agent Alioune SENHOR, argued that the Chairman of the Commission had based his decision on an assessment form containing the marks awarded to the person concerned and the assessments of his hierarchical superiors, and that as it was impossible to convene a meeting of the CCR.A due to the fact that its members were on probation, the Chairman of the Commission had to have recourse to the members of the Commission (College); that the decision was legal both in form and in substance; which the applicant refuted in his reply, stating that the Commission could not replace the C.C.R.A., as the two structures had different purposes and did not offer the same guarantees of impartiality.

## **ANALYSIS OF RESOURCES**

### **1. In the alternative, the applicant :**

The subsidiary claim for damages made for the first time in the reply modifies the subject-matter of the initial application and as such must be declared inadmissible, as the provisions of Article 31 of the Rules of Procedure prohibit the introduction of new pleas.

### **2. The pleas in law in the application :**

Under the terms of Article 29(2) of the WAEMU Staff Regulations, at the end of the probationary period, the competent authority shall decide whether or not to admit the official as a civil servant of the Union and shall notify the person concerned of its decision in writing. The official may not be established until the Advisory Committee on Recruitment and Promotion has given its prior advisory opinion in accordance with the provisions of Article 1<sup>er</sup> of Implementing Regulation No. 8/96/COM/WAEMU of 8 July 1996.

The UEMOA Commission claims that it was unable to set up this Committee because the people who were to make it up were on probation and that it had to make up for this by using a college of Commissioners instead of the C.C.R.A..

In so doing, it clearly circumvented the provisions of Articles 1 and 2 of Implementing Regulation No. 8, a text of substantial scope established to ensure the protection of staff interests.

As regards the assessment of the staff report made by the Chairman of the Commission, and as the rapporteur rightly pointed out, the administrative judge has no jurisdiction to assess the appropriateness of a decision falling within the exclusive power of the Administration.



It is not for the Court to rule on the validity or otherwise of the assessments made by the administrative authority, even though there is nothing in the file to suggest otherwise; the Court must certainly check whether the Commission has correctly assessed the facts in the light of the regulatory texts, but it cannot take the place of the Commission; thus, in the event that it annuls the decision, it cannot order the Commission to reinstate the applicant.

**The Advocate  
General :**

**MALET DIAKITE**

## **JUDGMENT OF THE COURT**

**29 May 1998**

Between

Mr Sacko Abdourahmane

And

The WAEMU Commission

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

delivers this judgment :

Whereas by application dated 25 April 1997, registered at the Registry of the UEMOA Court of Justice on 7 May 1997 under No 03/97, Mr SACKO Abdourahmane, through his counsel Ms Antoinette OUEDRAOGO, Avocat à la Cour de Ouagadougou (Burkina Faso), brought an action for annulment of Decision No 97-048/SP/PC of 27 February 1997 by which the President of the WAEMU Commission terminated his appointment to the said Commission at the end of his probationary period;

He states that he was recruited to WAEMU as a Senior Executive classified at step 10 of Grade B2 by Decision No. 40/96/PCOM of 19/02/1996 of the President of the Commission, and was to be established after a probationary period of twelve (12) months if at the end of that period his performance was deemed satisfactory;

That this training period actually began on 1 March 1996; that eight (8) months later, on 24 October 1996, he was appointed Head of the Communication and Documentation Division by Decision No. 109/96/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 with effect from 28 February 1997, his performance having been deemed unsatisfactory;

On 2 April 1997, he lodged an informal appeal with the Chairman of the Commission, which was unsuccessful:

1. annul the decision of the President of the Commission of 27 February 1997 terminating his office;
2. order his reinstatement in the Commission's services as Head of the Communication and Documentation Department with all the legal consequences;
3. order the Commission to pay the costs.

**Considering** that, in support of his action, the applicant claims that the contested decision is vitiated by illegality both in form and in substance;

As far as the form is concerned, it states on the one hand that the decision to appoint or dismiss a probationer is taken in principle after a detailed report, as is clear from the terms of Article 2 of Implementing Regulation No 5/96/COM/WAEMU setting the length of the probationary period and specifying that "on the basis of the evaluation file together with the marks and assessments of the hierarchical superiors of the person concerned, the President of the Commission shall take either a decision confirming the appointment, ... or a decision terminating the duties of the person concerned"; that apparently this evaluation file was not compiled; that on the other hand, the President of the Commission shall take either a decision confirming the appointment, ... or a decision terminating the duties of the person concerned.. or a decision terminating the employment of the person concerned"; apparently, this appraisal file was not compiled;

That, on the other hand, such a decision must be preceded by consultation of the WAEMU Advisory Committee on Recruitment and Promotion, instituted by Article 18 of Regulation No. 1/95 on the Staff Regulations of WAEMU Officials; that, in the present case, this Committee was not consulted;

That, on the merits, the decision in question was taken on the basis of a manifest error of

assessment insofar as, since his recruitment, he has spared no effort to

that he was never the subject of any letter of observation, reproach or sanction from his hierarchical superiors; that, on the contrary, his performance seems to have been well appreciated, since eight

(8) months after starting his internship, he was appointed Head of the Communication and Documentation Division;

**Considering** that, in reply to these pleas in law, the defendant argued that :

1. As regards the form, the assessment of the applicant was indeed carried out, the proof being a form attached to the memorandum, containing both the applicant's staff report and the assessments of his hierarchical superiors; as for the failure to consult the Advisory Committee on Recruitment and Promotion, this was due to the fact that it was impossible to convene a meeting of this body, since all the permanent and non-permanent members of the Committee were themselves at the end of their probationary period, which led the Chairman to consult the members of the Committee instead, whom he convened for this purpose.
2. On the substance, the conditions for the legality of the decision were met, the President having complied with the requirements of Article 29 of the Staff Regulations and those of Implementing Regulation No. 5/96 of 1 February 1996; that this was the case for all the officials of the Union.

**Considering** that, in response to these rebuttals, the applicant replied on 29 August 1997, stating that the argument based on the de facto impossibility of convening a meeting of the C.C.R.A. could not succeed, since when the members of the said Committee were appointed, the Commission was aware that they would be at the end of their probationary period at the same time as the civil servants whose files they would have to examine; moreover, civil servants at the end of their probationary period had been called upon to formulate assessments of probationers; in any event, in the absence of a text, the Commission could not be substituted for the C.C.R.A., the two structures have different remits and do not offer the same guarantees of impartiality;

That, moreover, the appraisal sheet that served as the basis for the contested decision describes him as an agent "lacking initiative and incapable of making concrete proposals".

During the whole of his training period, he was constantly taking initiatives and making concrete proposals for action, including :

- a programme proposal ;
- a detailed communication programme comprising a series of short-, medium- and long-term actions with precise objectives;
- a proposal for specific actions.

That despite the fact that it all came to nothing, he realised:

- a weekly press review for staff ;
- press briefings and articles.

That his hierarchical superiors, who were the Director of the General Secretariat, himself a trainee, and the Chairman of the Commission, did not direct, advise or encourage him during his traineeship, as was their duty. His work was therefore judged without objectivity;

**Considering** that, in addition to his initial submissions, the applicant added a new point requesting that, failing his reinstatement, the defendant be ordered to pay him the sum of ten million francs (10,000,000 F) by way of damages;

**Considering** that in a rejoinder dated 30 September 1997, the defendant argued that consultation of the College of Commissioners in this case offered greater guarantees of impartiality, since the Commissioners were in a better position than anyone else to assess their agents; moreover, they had solemnly sworn to carry out their duties with complete independence and impartiality;

As regards the assessment of the applicant's services, it should be remembered that, although he was attached to the Secretariat Directorate, he reported directly to the President of the Commission for most of his work; there can therefore be no error of assessment;

**Considering** that later, and with the authorisation of the President of the Court pursuant to Article 31 of the Rules of Procedure, the applicant submitted an additional pleading dated 30 March 1998 in which he increased the sum he claimed in damages to seventy million francs (FRF 70,000,000) on the ground that his loss had been aggravated by the fact that he was still unemployed, his former employer having refused to reinstate him on the ground that he had been seconded for a period of five years;

If he was led to ask for such a long secondment, it was because he was convinced at the time that he would make a career at WAEMU, given that the letter of recruitment given to him at the time of his recruitment did not include the condition of a prior probationary period;

He also searched in vain for a new job, as potential employers were waiting to be informed of the real reasons for his dismissal;

**Considering** that the defendant, who had evaded this head of the applicant's claim in his earlier pleadings, replied on 15 April 1998 to state that, since the Court had been seised principally of an application for annulment, it could not be asked to make an order for damages against the author of the contested measure, or any other injunction ; that this case falls within the ambit of litigation on legality, in which the court's power consists exclusively in assessing whether the act complies with the law and, as the case may be, declaring it valid or annulling it in whole or in part; that this head of claim should therefore be declared inadmissible;

That if, however, the Court were to decide otherwise, it would easily find that the merits of the case were dismissed; that, in fact, the argument put forward by the applicant to the effect that he had not been informed at the time of his recruitment of the probationary period is inoperative insofar as the letter sent to him specifying the conditions of his recruitment clearly indicated that his appointment would be made in accordance with the provisions of Regulation No 01/95/CM on the Staff Regulations of Officials of the WAEMU; Article 29 of this regulation unambiguously states this obligation; as a moderately prudent person, the applicant should have taken cognisance of these provisions before requesting his secondment, the present consequences of which cannot be attributed to WAEMU;

**Considering** that, in this respect, the applicant indicated during the hearing that he was on availability and not on secondment ;

Whereas 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 after having determined the questions to be answered and the legal framework of the case ;

**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 August 1995 on the Staff Regulations of Officials of the WAEMU and therefore calls for no particular comment;

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

- that the application was submitted in accordance with the requirements of Article 26 of the Rules of Procedure;
- that the applicant fulfilled the bond obligation on 2 June 1997;

Secondly, with regard to deadlines, it appears that :

1. Since the contested decision was dated 27 February 1997 and the applicant was notified of it on the same day, he had until the following 28 April to refer the matter to the Court; however, he preferred to lodge an informal appeal on 2 April, i.e. 26 days before the expiry of the time-limit for the contentious appeal, the effect of which was to suspend the time-limit, which did not start to run again until 7 April 1997, the date on which he was notified of the rejection of his informal application;
2. That the action, having been registered at the Court Registry on 7 May 1997, is well within the prescribed period;

In the light of the foregoing, Mr SACKO's action as initially brought must be declared admissible in form;



That, on the other hand, with regard to the part of the claimant's submissions seeking an order that the defendant pay him the sum of 10,000,000 F, subsequently increased to 70,000,000 F in the absence of his reinstatement, it should be pointed out that, on analysis, this part of the submissions does not appear to be a simple extension of the initial submissions, or even new submissions in their usual sense, as might be perceived at first sight; that, although presented in a suppletive form suggesting a connection with the initial submissions based on the suggested relationship of equivalence between reinstatement and compensation, this head of claim in fact introduces, indirectly and implicitly, an action for liability against the defendant; that if this way of proceeding is allowed before certain international courts it is because they are expressly empowered by the provisions of their statutes to order measures in substitution for reinstatement;

**Considering** that neither its Statutes nor its Rules of Procedure confer on the Court the power to order reinstatement and/or pecuniary compensation in the event of annulment of the contested act;

**Considering** finally that this action can have no other basis than in the event that, following the annulment of the contested decision, the defendant refuses to reinstate the applicant; that, as it relates to an act that is only possible, it cannot validly be brought before the Court; that it must be declared inadmissible as it stands;

Whereas, on the substance of the case, the Court is called upon to reply to the following questions, it being understood that an affirmative answer to the first question obviates the need to reply to the second:

1. Does the failure of the Chairman of the Commission to consult the Advisory Committee on Recruitment and Advancement (C.C.R.A.) before taking the contested decision constitute a procedural defect such as to render the decision null and void?
2. Was the contested decision based on a manifest error of assessment by the applicant's departments?

To this end, it is necessary to specify the legal framework of this case, consisting of :

- Article 33 al. 2 of the WAEMU Treaty conferring the power of appointment to Union posts on the President of the Commission and Article 17 of the Staff Regulations of Officials of the Union which refers to this;
- articles 18 and 29 relating respectively to the establishment of an Advisory Committee on Recruitment and Promotion and the compulsory probationary period prior to the establishment of WAEMU civil servants;
- Implementing Regulation No 5/96 laying down the length and conditions of the probationary period;
- Implementing Regulation No. 8/96 establishing the composition and operation of the C.C.R.A.;

It should also be pointed out that the legal regime of WAEMU civil servants appears to be much in line with those of our national civil services, which are themselves largely inspired by the French civil service, whose principles the Member States of the Union, with the exception of Guinea Bissau, have appropriated as a legacy of written reason;

That this explains, over and above the legal framework set out above, why the analysis of the questions posed may be based on French-language or French-inspired doctrine and case law, in what may be considered universal, as well as on the case law of international administrative tribunals relating to the matter, but in particular that of the Court of Justice of the European Communities, which in substance has strong similarities with French civil service litigation;

**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 governing the drafting of a unilateral administrative act, which is lawful only if the prescribed legal formalities have been observed by its author;

That both national and international administrative courts assess this **o n** the basis of the following elements of the formality in question:

1. Is the formality concerned prescribed by law or not?

- If it is not, it is considered optional and is not binding on the administrative authority;
  - If it is, then its performance is obligatory;
2. Where a formality is mandatory, it may or may not be substantial;

It is said to be substantial when it is likely to influence the decision to be taken by virtue of the guarantees it is supposed to offer; this is the case when the formality is provided for in the interests of the public or agents; failure to observe it will in principle result in the nullity of the act;

On the other hand, when it is not substantial, the omission of the formality is not sufficient in itself to render the act null and void; this is the case for formalities that are said to be in the interest of the administration itself or of the body in the process of taking decisions or measures of an internal nature;

**Considering** that, in the present case, consultation of the CCRA, insofar as it is formally instituted by Article 18 of the WAEMU Staff Regulations, was mandatory for the President of the Commission before the decision in question was taken; that, moreover, it does not appear from the defendant's pleadings that the defendant contested this, having confined himself to claiming that it was impossible in fact to carry it out;

**Considering** moreover that the CCRA was instituted and its role laid down by the WAEMU Staff Regulations; that in so doing, 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 the CCRA prior to decisions falling within its sphere of competence constitutes a substantial formality, the omission of which entails the nullity of the act concerned; that this too has not been contested by the defendant; that the question remains as to whether consultation of the CCRA was impossible as the defendant maintains, since in that case the contested decision would retain its validity;

**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 convene its members, nor to any other cause not attributable to the author of the decision; that the Committee was indeed in a position to convene; that

the President of the Commission deliberately chose not to consult it; the argument based on the fact that the members of the Committee were trainees is inoperative insofar as the Commission, which adopted the regulations implementing the Staff Regulations, was not unaware of this fact; it was up to it to take all appropriate transitional measures to remedy the situation; that the consultation of the College of Commissioners is no less inoperative, since no text has provided for it, even if only specifically as a transitional measure; it follows from all the foregoing that the contested decision must be annulled without it being necessary to examine the other pleas in law in the action;

**Considering** that, as this is an action for ultra vires, the Court, in the absence of a text authorising it to do so, cannot rule beyond annulment; that the applicant's claims that the Court should order his reinstatement must therefore be rejected;

#### **FOR THESE REASONS**

- Ruling publicly, contradictory, in in of Civil service Public Service;
- Receives the application from Mr SACKO Abdourahmane as initially submitted;
- Annuls Decision No 97-048/SP/PC of 27 February 1997 ;
- Orders UEMOA to pay the costs;