Case n° 02/2001

Akakpo Tobi Edoé

against

WAEMU Commission

"Contract staff - Community law - Action for annulment of a decision not to renew an employment contract - Procedure - Time-limit for bringing an action - Time-limit - Case of force majeure - Meaning - Limits".

Summary of the judgment

Leaving aside the particularities of the specific areas in which it is used, the concept of force majeure essentially refers to extraneous circumstances that make it impossible for the event in question to occur.

Although it does not presuppose absolute impossibility, it does require that the difficulties be abnormal, beyond the person's control and unavoidable even if all due care is taken.

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REPORT BY THE JUDGE-RAPPORTEUR

The applicant was hired on 26 July 1996 by the Commission of the West African Economic and Monetary Union as a planter for a renewable period of six (6) months. To this end, a fixed-term employment contract was signed between him and the President of the Commission, in accordance with the provisions of Regulation n°02/95/CM of 1er August 1995 on the regulations applicable to non-permanent staff of the Union.

This contract specifies that Mr AKAKPO TOBI EDOE is employed by UEMOA for a renewable period of six months, commencing on 1er August 1996.

After several renewals, another contract was signed between the two parties for a renewable period of two years, from 1er August 1998 to 31 July 2000.

On 5 May, by decision no. 00-006/PC/DAAF of 28 April 2000, he was informed that his employment contract would not be renewed until 31 July 2000.

Taking the view that the fixed-term contract binding him to the Commission had been transformed into a contract of indefinite duration because it had been renewed at least twice, Mr AKAKPO maintained that the termination of this type of contract was subject to the observance of a 3-month notice period, which the Appointing Authority had not respected, and that it must be the result of gross misconduct, which he said he had not committed.

For all these reasons, Mr AKAKPO TOBI EDOE asks the Court to declare his appeal admissible, to annul decision n°006006/PC/DAAF of 28 April 2000 with all the legal consequences and to order UEMOA to pay the costs.

By memorandum dated 16 February 2001, Mr Harouna SAWADOGO, Avocat à la Cour, 01 BP 4091 OUAGADOUGOU, acting on behalf of the Commission, asked the Court to declare in limine litis Mr AKAKPO TOBI EDOE's action for annulment dated 4 October 2000 inadmissible as having been brought out of time.

As to the merits, Maître SAWADOGO considered that the Commission had complied with all the legal provisions and that the non-renewal of a fixed-term contract that had come to an end could not be confused with dismissal, before asking the Court to declare Mr AKAKPO's appeal unfounded, to dismiss it and to order Mr AKAKPO to pay the costs.

Observations of the Judge-Rapporteur

It should be remembered 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 of the parties after having determined the questions 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 and Article 61 of Regulation No. 02/95/CM of 1er August 1995 on the Conditions of Employment of Non-Permanent Staff of the West African Economic and Monetary Union.

With regard to the admissibility of the appeal, it should be noted that the application was submitted in accordance with the requirements of Article 26 of the Rules of Procedure and that the applicant fulfilled the security obligation on 12 December 2000.

But when it comes to deadlines, it appears that :

- Since the contested decision was dated 28 April 2000 and notified on 5 May 2000, the applicant had until 5 July 2000 to bring the matter before the Court. Instead, he lodged an informal appeal on 3 June 2000, which had the effect of suspending the appeal. And in view of the silence of the appointing authority, the two-month period began to run on 4 July 2000;

- AKAKPO TOBI EDOE brought an action before the Court on 4 October 2000 instead of 4 September 2000, but he is asking the Court to relieve him of this time limit and to declare his action admissible because the illness which is affecting him has the characteristics of force majeure ;

- If the Court considers that Mr AKAKPO's application is admissible, it must answer the following questions:

Does renewing a fixed-term contract at least twice transform it into a permanent contract?

Is the procedure used by the WAEMU Commission to terminate the employment contract with Mr AKAKPO lawful?

To this end, we must first specify the legal framework of this case, which consists of :

- Article 33 paragraph 2 of the WAEMU Treaty conferring the power of appointment to Union posts on the President of the Commission;

- Article 8 of Additional Protocol No. 1 on supervisory bodies ;

- articles 19, 20 paragraph 7, 59 60 and 61 of Regulation n°02/95/CM of 1er August 1995 on the conditions of employment of non-permanent staff of the WAEMU;

- Articles 15 paragraph 4, 26, 55 and 56 of Regulation n°01/96/CM of 5 July 1996 on the Rules of Procedure of the WAEMU Court of Justice.

The Judge-Rapporteur :

<u>Youssouf Any MAHAMAN</u>

OPINION OF THE ADVOCATE GENERAL

By application dated 24 October 2000, Mr Akakpo Tobi EDOE, through his lawyer, Mr Hamidou SAWADOGO, brought an action for annulment of decision no. 00-006/PC/DAAF of 28 April 2000 of the President of the WAEMU Commission, terminating his office.

The facts as reported by the applicant can be summarised as follows:

Akakpo was recruited on 26 July 1996 by the WAEMU Commission as a planter for an initial renewable period of six months and assigned to the Commission's headquarters, recruitment in accordance with the provisions of Regulation no. 02/95/CM of 1er /08/1995 applicable to non-permanent staff of the Union.

On 5 May 2000, the President of the Commission notified him of the aforementioned decision terminating his duties on 31 July 2000.

On 3 June, he lodged an informal appeal against this decision, which has not been followed up.

In support of his action for annulment, he argues that:

1. The decision was vitiated by a formal defect in that the termination of his contract had not been preceded by the prior opinion of the authority responsible for managing resources and the Disciplinary Advisory Committee, required pursuant to Article 39 of the aforementioned Regulation;

2. Having been recruited on a renewable six-month contract, renewed more than twice and then converted into a permanent contract, he believes that he should have been given three months' notice, which had not been the case, hence the violation of the provisions of article 20 paragraph 7 of these Regulations; moreover, he has always served loyally and has not incurred any disciplinary sanction.

In its defence, the Commission submits in limine litis that the action is inadmissible for failure to observe the procedural time-limits prescribed in Article 8 of the Protocol.

additional provision no. 1, which obliges the applicant, in the case of appeals to assess legality, to challenge the act within two months of its notification; even considering the applicant's application for judicial review dated 3/06/2000 as interrupting the two-month time limit, the latter remained time-barred, since the time limit would have started to run on 4/07/2000.

The Commission rejected the applicant's pleas in law and main arguments, arguing that the contract was for a fixed term and that it was coming to an end; that there was no reason to give notice, as the contract had not been terminated before it expired.

She concluded that the action was ill-founded and that the applicant should be ordered to pay the costs.

In his reply, the applicant submits that it was due to illness that he was unable to appoint a lawyer in time to lodge an action for annulment following the application for an injunction, within the required time limit; that this situation constituted force majeure for him, which should relieve him of the time bar.

Without discussing the applicant's arguments, it should be noted that the applicant received the statement of defence on 2 March 2001 and was required to reply to it by 2 April at the latest; but as the reply was not received by the Registry until 10 April, outside the one-month time-limit granted to the applicant pursuant to Article 30 of the Rules of Procedure, it must be declared inadmissible as late and removed from the hearing.

DISCUSSION OF MEANS

The Court's jurisdiction is clear, pursuant to Articles 16 of Additional Protocol No. 1 and 61 of Regulation No. 02/95/CM of 1 /08/1995.[er]

ADMISSIBILITY OF THE ACTION

The Commission submits in limine litis that the appeal is inadmissible on the grounds that it was not lodged within two months of notification of the decision to the applicant; that, moreover, in view of the fact that an application for judicial review suspends the time-limit for bringing an action, the applicant was nonetheless relieved of the time-limit; that, in fact, since the pre-litigation appeal was lodged on 3 June 2000 and in view of the silence of the appointing authority, the Commission's decision is inadmissible.

As regards recruitment, the two-month period began to run on 4 July 2000 and expired on 4 September 2000, the last date useful to the applicant.

On 24 October 2000, the applicant appealed against the decision notified to him on 5 May 2000; but by letter dated Saturday 3 June 2000, and within the time-limit for appeals (two months from notification), he lodged an informal appeal with the recruitment authority (President of the Commission), which was received by the Commission on the same day; The Commission had thirty days in which to respond, but took no action; the applicant's request is therefore considered to have been implicitly rejected; as the time limit for appeals was two months from 4 July and expired on 4 September, the applicant was clearly precluded from making a decision on 24 October.

It follows, by application of Articles 59 to 61 of the above-mentioned Regulation No. 02/95/CM, that the appeal is inadmissible by reason of foreclosure;

That it is important to consider the time-limits for bringing actions laid down by this regulation for the purposes of legal certainty and the continuity of the Community public service; that, just as it is imperative to penalise inertia on the part of the Community institutions which is prejudicial to litigants, the latter must also be answerable for their negligence resulting from failure to observe procedural time-limits.

WHAT ABOUT THE SUBSTANCE?

The claimant alleges infringement of Articles 19, 39 and 21 of Regulation No 02/95/CM of 1er /8/1995 in that the Commission failed to consult the required consultative bodies, and to give three months' notice, in a contract that had become open-ended due to more than two renewals.

The applicant was employed under a fixed-term contract dated 26/7/1996, running from 1er /8/1996 and expiring on 31/01/1996. The contract was renewed three times by :

- Amendment no. 1 for 6 months (from 31/02/1997 to 31/07/1997) ;
- Amendment no. 2 for 5 months (from 1er /08/1997 to 31/12/1997) ;

- Amendment No. 3 for 7 months (from 1er /01/1998 to 31/07/1999).

Under the terms of a new fixed-term contract (no. 11/99/PC/CM of 20/04/1999 by the President of the Commission), he was hired for two years, from 1er /08/1999 to 31/07/2000.

On 5 May, the recruiting authority informed him in writing of its intention to terminate the contract when it expired.

The applicant considered that the Commission's decision infringed the provisions of Article 19 because his contract of 26/7/1996 had been renewed more than twice; the Commission disputed this.

It argues that the two renewals authorised by this text apply only to the duration of the contract, i.e. the same duration of a given contract cannot be renewed more than twice.

Under the terms of this article, temporary staff are recruited "on fixed-term contracts for a period of between six months and two years, renewable twice".

The duration of the contract therefore varies from 6 months to two years; the same applies to the duration of renewals, and within these limits, contracts and renewals can have different durations; renewal, or more precisely the term "renewable", is linked both legally and semantically to "contract" and not to "duration".

However, the contract had expired and no longer governed the parties' contractual relationship at the time of the present action. It cannot therefore serve as a basis for the judicial settlement of the dispute and must therefore be disregarded.

The applicant's cessation of activities must be assessed, on the other hand, in the light of the contract of 20/4/1999 and Regulation no. 02/95/CM.

Article 45 - b) of the said Regulations provides that the contract shall terminate on the date fixed in the contract; it is not disputed that the contract was for a fixed term; by its nature, it expires on the expiry of the term fixed at 31/07/2000 without the applicant being able to rely on a contract for an indefinite term, notice and other prerequisites; the fact of terminating it is in no way disciplinary in nature.

It follows that the pleas in law are unfounded and must be rejected.

ON EXPENSES

We conclude that, as the action is inadmissible, the applicant must be ordered to pay the costs and the security returned to UEMOA.

In the event of a dispute between a member of staff and the Union, the costs incurred by the Commission shall be borne by the latter (Articles 60 and 61 of the Rules of Procedure, 31 of the Statutes of the Court).

The Advocate General :

Malet DIAKITE

JUDGMENT OF THE COURT

20 June 2001

Between

Akakpo Tobi Edoe

And

The WAEMU Commission

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

delivers this judgment :

Whereas by application dated 4 October 2000, registered at the Registry of the WAEMU Court of Justice on the same day under No 02/2000, Mr AKAKPO Tobi Edoe, through his Counsel, Maître Hamidou SAVADOGO, Avocat à la Cour de OUAGADOUGOU (Burkina Faso), brought an action for annulment of Decision No 00- 006/PC/DAAF of 28 April 2000 by which the President of the WAEMU Commission informed him that his employment contract would not be renewed on 31 July 2000;

He states that he was recruited by UEMOA as a planter under a fixed-term employment contract dated 26 July 1996, for an initial renewable period of six months;

That this contract was renewed for a further period of six months from 1er February 1997 to 31 July 1997 by amendment No 1 dated 14 February 1997;

Following two further amendments to the contract by addenda no. 2 and no. 3 for a period of five and seven months, the two parties entered into another fixed-term contract for a renewable period of two years, running from 1er August 1998 to 31 July 2000;

On 5 May 2000, he was notified by Decision No. 00-006/PC/DAAF of 28 April 2000 of the President of the WAEMU Commission that his contract would not be renewed on 31 July 2000; **That** on 3 June 2000, he lodged an informal appeal with the President of the Commission, which was unsuccessful; that he therefore referred the matter to the Court on 4 October 2000 for a ruling:

1. declare his action admissible and well-founded;

2. annul Decision No 00-006/PC/DAAF of 28 April 2000and anddraw all legal consequences therefrom;

3. order the Commission to pay the costs;

Considering that in support of his action, the applicant claims that the contested decision was taken in violation of Articles 19 and 20 paragraph 7 of Regulation No. 02/95/CM of 1er August 1995 on the regime applicable to non-permanent staff of the WAEMU;

Firstly, the fixed-term contract between him and the Commission has been transformed into an open-ended contract (having been renewed on more than two occasions), the termination of which is subject to a three-month notice period and must be due to gross misconduct;

Secondly, this decision, which he considers to be a sanction, must be preceded by a proposal from the authority responsible for human resources management and an opinion from the Civil Servants' Disciplinary Advisory Committee, which was not done;

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

1. as regards form, the application lodged on 4 October 2000 is inadmissible because it was submitted after the deadline;

2. on the merits, the conditions governing the legality of the decision were met, as the President of the Commission complied with the provisions of Article 45 of Regulation 02/95/CM on the Conditions of Employment of Non-Permanent Staff of the WAEMU;

Considering that, in response to these rebuttals, the applicant replied on 10 April 2001 to state that the argument based on the lapse of time could not prosper because, on the one hand, following a complaint lodged against him by the UEMOA for theft of office furniture, he had been arrested, ill-treated and tortured before being released without charge; that, on the other hand, the discovery of his illness had taken on the characteristics of force majeure for him;

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 WAEMU and Article 61 of Regulation No. 02/95/CM of 1er August 1995 on the conditions of employment of non-permanent staff of WAEMU, and consequently 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 and that the applicant fulfilled the security obligation on 12 December 2000;

- but as far as deadlines are concerned, it appears that he must comply with the provisions of Article 61 of Regulation No. 02/95/CM on the Conditions of Employment of Non-Permanent Staff of the WAEMU, which stipulates that :

"The WAEMU Court of Justice is competent to hear any dispute between the Union and one of its contractual agents.

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

- if the appointing authority has previously received a request within the meaning of Article 59 ;

- if this request has resulted in an implicit partial or total rejection by the recruiting authority.

The appeal must be lodged with the Court within two months of the date on which it was lodged:

- from the date of publication of the decision ;

- the date of notification to the employee concerned;

- of the day on which the person concerned became aware of it;

- the date of expiry of the time limit for response, where the appeal relates to an implied rejection decision".

In the present case, as the contested decision dates from 28 April 2000 and was notified on 5 May 2000, the applicant validly lodged his informal appeal on 3 June 2000;

In view of the silence of the appointing authority, the two-month time limit for bringing a case before the Court began to run on 4 July 2000;

That, since the application was registered at the Court Registry on 4 October 2000 instead of 4 September 2000, it was lodged well outside the prescribed period;

In view of the foregoing, Mr AKAKP0's action as initially brought must be declared inadmissible;

Considering that Mr AKAKPO nevertheless asks the Court to relieve him of his foreclosure and to declare his appeal admissible, even though it was lodged out of time, on the grounds of force majeure: the discovery of his illness;

The question that must therefore be asked is whether, in this case, the conditions of force majeure were met;

It should be noted that the time-limit for bringing an action is a strict one and that it can only be extended by virtue of the time-limits for distance provided for in Article 69(e)(3) of the Rules of Procedure; even though that article does not expressly provide for force majeure, it follows from the general principles of law constantly accepted by this Court that a forfeiture based on the expiry of time-limits cannot be invoked where the existence of a fortuitous event or force majeure is established;

That the concept of force majeure essentially refers to extraneous circumstances that make it impossible to carry out the event in question; even if it does not presuppose absolute impossibility, it does require that the difficulties be abnormal, beyond the person's control and unavoidable even if all due diligence is exercised;

Considering that it is clear from the file and the debates at the hearing that Mr AKAKPO only became aware of his illness in December 2000, that is to say three months after the expiry of the time-limit for lodging an appeal; that he lodged his application for an injunction within the required time-limit and that he instructed a lawyer in August 2000, but that he did not show all the diligence required of a normally informed person to lodge an appeal with the Court within the required time-limit;

Consequently, it should be noted that in the present case, there are neither abnormal and unavoidable difficulties, nor external events beyond Mr AKAKPO's control which could have justified his application being lodged out of time;

In any event, it follows that the late lodging of the action is not attributable to force majeure and that the action is inadmissible;

Considering that, as this is a dispute between the Union and its agent, it is appropriate, in accordance with the provisions of Article 61 of the Rules of Procedure, to order UEMOA to pay the costs;

FOR THESE REASONS

The Court, sitting in open court, having heard the parties, in matters relating to the Community Civil Service :

- Declares Mr AKAKPO's appeal inadmissible;
- Orders UEMOA to pay the costs.