

## **The case of Jean-Baptiste TAVARES**

**against**

### **WAEMU Commission**

Community civil service law - Action for annulment of a decision to lay off an  
employee for 8 days - Time limit for bringing an action -  
Time-barred - Appeal inadmissible

#### Summary of the judgment

- *Neither the rules governing the Court's jurisdiction, nor those organising its referral to the Court, nor those governing the Staff Regulations of the Union have provided for a second administrative appeal.*
- *The administrative appeal only has to be lodged once.*
- *The reply from the President of the Commission on 22 May 2001 is an explicit rejection decision, giving the right to lodge an appeal within two months, in accordance with the provisions of Article 59 of Regulation 02/95, i.e. by 23 July 2001 at the latest.*
- *The appeal lodged on 10 September 2001, more than 27 days later, was out of time.*

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

### **I. FACTS AND PROCEDURE**

Mr Jean-Baptiste TAVARES, Macro-economist, in charge of multilateral surveillance in the Economic Policy Department of the West African Economic and Monetary Union (WAEMU), was granted leave of absence from 22 to 26 December 2000 and travelled to Abidjan in Côte d'Ivoire.

He was due to return to work at UEMOA on 27 December 2000, but according to him, he contracted an illness and was treated by Dr BOSSON Michel.

He did not return to work until 8 January 2001, 12 days later.

When he returned to work, he tried to meet his line manager to explain his absence, but to no avail.

On 11 January 2001, he received a written request for explanations from the Commissioner in charge of the Economic Policy Department (DPE) regarding his failure to report for duty on time.

In response to this request, on 15 January 2001 he sent two medical certificates dated 28/12/00 and 02/01/01 to justify his non-attendance.

On 15 March 2001, by letter no. 01-27/SP/PC, the President of the WAEMU Commission informed him of a decision to lay him off for seven (7) days for unauthorised absence from work from 27 December 2000 to 8 January 2001.

On 04 May 2001, he lodged an application with the Chairman of the Commission, who rejected his application by letter dated 22 May 2001.

On 11 June 2001, Mr TAVARES again applied to have the decision annulled, but this second application remained unanswered.

By application dated 10 September 2001, registered at the Registry of the Court of Justice under no. 01/2001 of 10 September 2001, Mr Jean-Baptiste TAVARES, through his lawyer Maître SANKARA S. Bénéwendé, Avocat à la Cour - 01 B.P. 4093 OUAGADOUGOU - has requested that the Court of Justice :

- 1°) Simply annul the suspension imposed on him:
  - principally for lack of competence on the part of its author
  - and in the alternative for lack of fault;
- 2°) Order the repayment of his outstanding salary of seven (7) days arbitrarily withheld;
- 3°) Order UEMOA to pay him the symbolic sum of 1 F by way of damages;
- 4°) Order UEMOA to pay the costs.

To justify his request, Mr. Jean-Baptiste TAVARES asserts that the decision of the President of the Commission is illegal because it violates Article 38 of Regulation n°02/95/CM of 1<sup>er</sup> August 1995 on the Conditions of Employment of Non-Permanent Staff of the European Union; this is why he initially tried to have this sanction annulled by the informal appeals of 4 May and 11 June 2001, but without success.

He maintains that he was therefore obliged to bring an action before the Court of Justice to obtain compensation because, on the one hand, there can be no penalty for justified acts, as there was no fault in his case, which was a fortuitous event.

On the other hand, the author of the decision does not have jurisdiction by virtue of the regulatory provisions in question.

He therefore asked the Court to :

- 1°) declare his application admissible,

2°) grant all of its claims.

The UEMOA Commission, which was notified of the appeal on 12 October 2001, concluded in its statement of defence that Mr TAVARES' arguments could not withstand the rigour of legal analysis in terms of both form and substance.

As a matter of form, it considers that the appeal lodged on 10 September 2001 is inadmissible because the pre-litigation appeal was lodged out of time.

As to the merits, she pointed out that if the Court were unable to declare the application admissible, it would have to reject it as ill-founded because, on the one hand, the provisions of Article 38 relied on allowed the legality of the decision to be ascertained if they were read carefully and, on the other, it was a fundamental principle that whoever can do more can do less.

On the other hand, the applicant himself acknowledges that his absence on 5 January 2001 was unjustified.

She considers that this admission of partial justification for her non-attendance at the service justifies the sanction taken.

The Commission asks the Court to :

- As a matter of form, declare the appeal inadmissible,
- In the alternative, dismiss all of Mr Tavares' claims.

On 27 December 2001, the applicant replied to the Commission's memorandum, confirming the arguments contained in the application and adding a new argument based on the illegality of the double penalty.

He notes that, according to an elementary principle of law, a single offence cannot give rise to a double sanction, whereas he was given a suspension and a salary deduction of three hundred and one thousand eight hundred and fifty three (301,853) CFA francs, which he is seeking to have returned.

## **II. ARGUMENTS OF THE PARTIES**

### **A. Formal means**

In its statement of defence dated 17 December 2001, the WAEMU Commission concluded that the action should be declared inadmissible on the grounds that the pre-litigation action lodged on 11 June 2001 was out of time because it had to comply with the time-limit for litigation.

The pre-litigation appeal provided for in Article 59 of the Rules of Procedure must be lodged before the expiry of the period for lodging an appeal, failing which it will be time-barred.

It points out that having lodged his pre-litigation appeal on 11 June 2001 against a decision of 15 March notified before 2 April 2001, although he had until 3 June 2001 to do so, Mr TAVARES acted outside the time limit, w h i c h means that the present appeal is inadmissible.

In his reply of 27 December 2001, the applicant maintains that the pre-litigation procedure is merely an invention of the defendant.

Article 59 of the aforementioned Regulation No. 02/95/CM does not set any time limit for staff to refer a matter to the appointing authority.

Even if this time limit existed, it was covered by the UEMOA's reply of 22 May 2001, which referred to the pre-contentious time limit, which led to the new request for cancellation on 11 June 2001.

He therefore argued that this argument should be rejected and that his appeal was admissible.

## **B. Substantive resources**

In the summary of the facts accompanying the application, and in the reply of 27 December 2001, the applicant puts forward three pleas in law:

1°) On the absence of fault :

Mr TAVARES points out that his absence was justified by the medical certificates issued for six (6) working days of the period of his absence.

He added that a precise count of working and non-working days left only six (6) days and not nine as claimed by the Chairman of the Commission.

He pointed out that the various legal holidays in Burkina Faso had to be taken into account (Ramadan on 28 December, New Year's Day and 3 January). Still according to Mr TAVARES, the medical certificates covered all six (6) days with the exception of 5 January 2001.

With regard to the sick leave, he argued that it did not fall into the category of authorised or unauthorised absences, but was the result of an enforceable decision by the doctor. Such sick leave cannot therefore be the subject of a penalty.

In his view, even if it is true that the medical certificate should only justify a future absence, it was personally impossible for him to communicate his certificates in a timely manner due to the disruption of the communication system in Côte d'Ivoire at that time (the coup de force of 7 and 8 January 2001).

He went on to say that there was a fortuitous event that could be likened to force majeure and that on this point the facts did not appear to be sufficiently well-founded to justify the severity of the penalty imposed.

Finally, again according to Mr TAVARES, this sanction was taken in breach of Articles 73, 74, 75 and 76 of Regulation 01/95 on the Staff Regulations of Officials of the European Union.

2°) On the lack of jurisdiction of the person imposing the penalty :

The applicant maintains that the decision taken is unlawful because the person competent to impose first-degree penalties, in accordance with the provisions of Article 27 of the Treaty, is the Commissioner responsible for the Economic Policy Department, because it is he who is the authority responsible for the technical management of the services.

He added that by taking the decision to impose the sanction himself, the President of the Commission had violated the provisions of Article 38 of Regulation 02/95/CM on the Conditions of Employment of Non-Permanent Staff of the European Union.

3°) On the question of the double penalty :

In his reply, Mr Jean-Baptiste TAVARES raises a final argument to the effect that there cannot be a double penalty for the same fault. He points out that in this case, even if there was a fault, it could not be punished twice. Unfortunately, this was the case, since he was given a seven (7) day suspension and had his salary of 301,583 FCFA withheld.

As for the WAEMU Commission, it raises, in the alternative on the merits, the pleas that the action should be dismissed as unfounded.

On the one hand, it points out that the principle that whoever can do more can do less authorises the Chairman of the Commission, who is responsible for higher-level sanctions, to impose lower-level sanctions.

On the other hand, it adds that the applicant himself acknowledges that his absence was only partially justified, and this statement constitutes an admission that justifies the penalty imposed.

These are the pleas put forward by the parties.

The Court of Justice will first have to rule on its jurisdiction and the admissibility of the action before examining the pleas in law in order to rule on the merits of the claim.

### **III. DISCUSSIONS**

- Jurisdiction :

Articles 16 of Additional Protocol n°01 relating to the supervisory bodies of the WAEMU, 15 of Regulation n°01/96/CM on the Rules of Procedure of the Court of Justice of the WAEMU, 65 of Regulation n°02/95/CM of 1<sup>er</sup> August 1995, define the jurisdiction of the Court of Justice with regard to disputes between the Union and its staff.

- Admissibility :

It should be noted that the application was lodged on 10 September 2001 against a decision taken on 15 March 2001, which was the subject of an informal appeal on 4 May 2001, to which the WAEMU Commission replied on 22 May 2001; that it was on the basis of this reply that a second informal appeal was lodged.

Assuming that the application of 4 May 2001 is the only valid one, Mr TAVARES had two (2) months from the Commission's reply of 22 May 2001 to refer the matter to the Court, i.e. by July 2001 at the latest; by lodging his application on 10 September, Mr TAVARES was precluded from doing so and the application must be declared inadmissible.

But if we consider that the UEMOA Commission's letter of 22 May 2001 applied the time limits, Mr TAVARES had a time limit of two (2) months from the date of expiry of the time limit for reply provided for in articles 60 and 61 of the aforementioned Regulation n°02/95, which is one (1) month when the appeal relates to an implicit rejection decision.

Article 59 does not stipulate any time limit for referring a case to the competent authority, and by lodging his appeal on 10 September 2001 after an informal appeal of 11 June 2001 plus the one-month time limit for a reply (11 July 2001), Mr TAVARES was within the time limit, since he had two (2) months to refer the case to the Court from 11 July 2001.



-Background:

If the Court considers that the application is admissible, it must answer the following questions:

- 1) Was the authority that took the decision to impose the penalty competent within the meaning of Article 38 of the Regulation, which states that first-level penalties are imposed by :
  - The employee's immediate superior in the case of a warning ;
  - The authority responsible for the technical management of the service, after consulting the authority responsible for human resources management and after obtaining the opinion of the Disciplinary Advisory Committee for Civil Servants in the case of reprimand and dismissal.

Is the Chairman of the Commission the authority responsible for the technical management of the service?

In this case, Mr TAVARES' immediate superior is the Commissioner in charge of the Economic Policy Department, who is responsible for issuing warnings only; this direct hierarchical superior does not have the power to issue more serious sanctions.

Articles 33 et seq. of the Treaty, which define the functions of the President, and Articles 2 and 3 of Decision No. 92/96/COM of 22 October 1996 on the creation and organisation of the services of the WAEMU, define the powers of the members of the Commission. The decision was therefore taken by the competent authority.

While, in principle, the hierarchical superior may not impose a more serious sanction than a warning, which falls within his or her remit, the Chairman of the Commission, who is the Commissioner's hierarchical superior, may impose less serious sanctions than those falling within his or her remit. (See also Articles 23 to 26 of the Commission's Internal Rules).

2) Was Mr Jean-Baptiste TAVARES' absence justified?

Can a fortuitous event be invoked to absolve Mr TAVARES of any wrongdoing?

If there was a fault, was there a double penalty?

Medical certificates must justify future absences. Mr TAVARES' medical certificates were issued after the expiry of his leave of absence (certificates dated 28/12/00 and 02/01/01); these certificates were not even sent in time.

The pretext of the disruption of telecommunications in Côte d'Ivoire cannot exonerate it from this obligation to justify itself; the coup de force invoked having taken place on 7 and 8 January 2001.

With regard to the double sanction, it should be remembered that the salary deduction is not a sanction as such, but the consequence of the lay-off, which is a seven (7) day stoppage of work for misconduct. If the employee had to stop work and receive his salary, there would no longer be a penalty; consequently, there was no double penalty.

**The Judge-Rapporteur :**

**FOFANA née OUEDRAOGO Ramata**

## **OPINION OF THE ADVOCATE GENERAL**

### **THE FACTS AS NOT DISPUTED BY THE PARTIES :**

Mr Jean-Baptiste TAVARES, Macro-Economist in the Economic Policy Department of the West African Economic and Monetary Union (WAEMU) Commission in Ouagadougou, was granted leave of absence from 22 to 26 December 2000, but did not return to work on 27 December. He returned to work on 08 January 2001, twelve (12) days later.

To find out why he had not returned to work on 27 December 2000, his superior, the Commissioner in charge of the Economic Policy Department, sent him a letter dated 11 January 2001 asking for an explanation. This letter asked Mr TAVARES to provide a reasoned explanation.

By way of reply to the letter requesting an explanation, Mr TAVARES, in a terse letter of two (2) lines dated 15 January 2001, sent two medical certificates, each for three (3) days' rest, issued in Abidjan, the first on 28 December 2000, the second on 02 January 2001.

Having failed to obtain the explanations he requested, the Commissioner informed the President of the Commission by letter dated 23 January 2001 of the reply given by Mr Jean-Baptiste TAVARES.

In this context, by letter dated 15 March 2001, the Chairman of the Commission imposed a seven (7) day suspension on Mr Jean-Baptiste TAVARES, with effect from Monday 02 April 2001.

The Chairman of the Commission stated that he had taken this disciplinary action after receiving the opinion of the Disciplinary Advisory Committee on 16 February 2001 and in view of the misconduct of which Mr TAVARES was accused.

In a letter dated 04 May 2001, he lodged an informal appeal with the Chairman of the Commission, requesting that the disciplinary action taken against him be annulled.

In this letter, Mr TAVARES contested the validity of the disciplinary action taken against him.

Furthermore, according to the terms of the same letter, Mr TAVARES said that he had been the victim of discriminatory practices since taking up his post at the WAEMU Commission. He stated that the malfunctioning of the staff appraisal system was seriously prejudicing his professional career. He added that if the situation persisted, he would be obliged to refer the matter to the WAEMU Court of Justice.

By letter dated 22 May 2001, the Chairman of the Commission rejected Mr. Takares' request to have his disciplinary sanction cancelled.

Indeed, citing Mr TAVARES' letter of 04 May 2001 as a reference, the President of the Commission merely pointed out that :

- On reading Mr TAVARES' letter of 04 May 2001, he noted that Mr TAVARES contested the merits of the disciplinary sanction, taking the view that, from a procedural point of view, he was in breach of the provisions of Articles 73, 74, 75 and 76 of Regulation no. 01/95/CM of 1<sup>er</sup> August 1995 on the Staff Regulations of Officials of the Union;
- While asking for the disciplinary sanction to be lifted and annulled, Mr TAVARES protested against his hierarchical superior, wanting to take his case to the UEMOA Court of Justice (to the President of which he sent a copy of the letter in question) to lodge a complaint against him for abuse and misuse of power as well as characterised harassment;
- Mr TAVARES seemed to lose sight of the fact that the medical certificates he provided did not cover the entire period of his absence;

- Mr TAVARES should have informed his line manager, either directly or, if he was unavailable, through a third party, even by telephone, as soon as he became aware that he was off sick;
- However, until he returned to work on 08 January 2001, Mr TAVARES did not think it necessary to inform his line manager of his situation.

As he was not satisfied with the Commission Chairman's response, Mr TAVARES wrote to the Commission Chairman on 11 June 2001 to lodge a further appeal (not provided for in the legislation).

In this correspondence, Mr TAVARES acknowledged that his absence from work on Friday 05 January 2001 was unjustified and stated that his absence (during the twelve days) was partially justified.

This second appeal has gone unanswered.

#### **THE PROCEDURE :**

By memorandum dated 10 September 2001, Mr Bénéwendé SANKARA, a lawyer at the Ouagadougou Bar, acting in the name and on behalf of Mr Jean-Baptiste TAVARES, brought an action before the WAEMU Court of Justice.

In support of his application, Maître Bénéwendé SANKARA states :

- that in December 2001 Mr Jean-Baptiste TAVARES was granted leave of absence from 22 to 26 December 2001 and travelled to Abidjan to take advantage of this leave;
- that unfortunately he contracted an illness and was monitored by Doctor Michel Bosson, who issued him with two medical certificates recommending days off work;
- as a result of these events, he was only able to resume his duties at the headquarters of the WAEMU Commission in Ouagadougou on 8 January 2001;

- on his arrival, he tried in vain to provide explanations to his hierarchical superior, who refused to receive him on the pretext that he was preparing for the arrival of Madame FONTAINE, President of the European Parliament;
- that, contrary to all expectations, he received a letter dated 11 January 2001 from the Commissioner in charge of the Economic Policy Department of the WAEMU Commission inviting him to provide explanations concerning his absence from duty after his leave of absence had been granted in Abidjan;
- that on 15 January 2001 he submitted these medical certificates to justify his absence;
- that despite the fact that his non-attendance was justified by a fortuitous event, he was sanctioned by the Chairman of the Commission with a seven (7) day suspension of his salary;
- that such an attitude on the part of the President of the Commission was illegal in that it violated Article 38 of Regulation No 02/95/CM of 1<sup>er</sup> August 1995 on the Staff Regulations applicable to non-permanent staff of the WAEMU;
- that it has therefore unsuccessfully sought to have the sanction imposed by the President of the WAEMU Commission annulled;
- that there was clearly an abuse that only the WAEMU Court of Justice could mitigate;
- that, in truth, there can be no penalty for justified acts and that the principle is that a fortuitous event discharges any fault, even though in the case in point there is no fault;
- that, worse, the person who took the decision to lay off the applicant is not competent in the light of the provisions of the aforementioned regulations;
- which it seeks from the Court:

- to annul the suspension of Mr Tavares' employment on the grounds of incompetence;
- in the alternative, annul the decision for lack of fault;
- order the return to Mr TAVARES of the balance of his salary for seven (7) days arbitrarily withheld;
- order the WAEMU Commission to pay him one (1) symbolic franc in damages;
- order it to pay all the costs.

By memorandum dated 07 December 2001, Maître Harouna SAWADOGO, Avocat au Barreau de Ouagadougou, acting in the name of and on behalf of the WAEMU Commission, submits that Mr Jean-Baptiste TAVARES' application is inadmissible on the following grounds:

- that, invoking the provisions of article 59 of Regulation n°02/95/CM of 1<sup>er</sup> August 1995, on the conditions of employment of non-permanent staff of the WAEMU, Mr TAVARES had until 03 June 2001 to lodge an informal appeal since it is not disputed that the decision to lay him off was notified to Mr TAVARES before 02 April 2001, the date on which it took effect;
- in other words, the pre-litigation appeal must be lodged before the expiry of the time limit for the contentious appeal, otherwise it will be time-barred;
- having brought the said action on 11 June 2001, the plaintiff acted out of time.

In the alternative, Maître Harouna SAWADOGO seeks the dismissal of the application to set aside the decision to lay him off, an application based on the absence of fault. He argues that this request should be rejected since Mr TAVARES acknowledged in his

correspondence of 11 June 2001 (addressed to the Chairman of the Commission) that his absence on Friday 05 January 2001 was unjustified.

## **DISCUSSION :**

### **A) Form**

Mr Jean-Baptiste TAVARES is a contract agent, a non-permanent agent of the Union. He is statutorily covered by the system instituted by Regulation n°02/95/CM of 1<sup>er</sup> August 1995 on the conditions of employment of non-permanent staff of the Union.

The decision to lay off the employee was taken on 15 March 2001 by the Chairman of the Committee and was notified to the applicant on the same date. By letter dated 04 May 2001, he lodged an informal appeal with the person responsible for the decision to lay him off. The Chairman of the Commission replied by letter dated 22 May 2001.

As the reply from the President of the Commission was not favourable to the applicant, he had two (2) months to refer the matter to the Court of Justice, as stipulated in article 61 of the aforementioned Regulation no. 02/95/CM of 1<sup>er</sup> August 1995. As the contentious appeal was lodged on 10 September 2001, Mr TAVARES incurred the forfeiture of time for having acted out of time.

Even if it were assumed that the reply dated 22 May 2001 from the President of the Commission was not notified to the applicant on 22 May 2001, it was notified to him before 11 June 2001, since he lodged a second informal appeal (not provided for in the abovementioned regulation) by letter dated 11 June 2001, which referred to the reply given by the President of the Commission.

In the latter case, the applicant had to lodge an appeal with the Court by 12 August 2001 at the latest.

In any event, Mr TAVARES has been foreclosed.

The application must be declared inadmissible.



## **B) Background**

If the Court declares the application admissible, it will have to rule on the merits. We devote the final part of our conclusions to the pleas raised by the applicant in this part of the case, namely the lack of jurisdiction of the person who took the decision to lay him off and the absence of fault.

### 1) On the incompetence of the person who decided to lay off the employee

Article 38 of Regulation no. 02/95/CM of 1<sup>er</sup> August 1995 states that first-level sanctions are imposed by :

- The employee's immediate superior in the case of a warning ;
- The authority responsible for the technical management of the service, after consulting the authority responsible for human resources management, and the opinion of the Disciplinary Advisory Board for Civil Servants, as regards reprimand and dismissal.

It is important to note first of all that the direct hierarchical superior of Mr Jean-Baptiste TAVARES is the Commissioner in charge of the Economic Policy Department, by virtue of Article 15 of Decision n°92/96/COM of 22 October 1996 on the creation and organisation of the services of the WAEMU Commission, which specifies that the Commissioner directs and coordinates the action of the Directorates and Divisions making up the Department for which he is responsible.

By delegation from the Chairman of the Commission, he exercises hierarchical authority over the staff of his department.

It is therefore the Commissioner who imposes first-level sanctions in the case of warnings (article 38 of the aforementioned Regulations).

The same article 38 specifies that it is the authority responsible for the technical management of the department that issues the reprimand or suspension.

Reprimands and dismissals are more serious sanctions than warnings, which, according to the spirit of the text, must be pronounced by an authority superior to the Commissioner. This authority is the one responsible for the technical management of the service, which is the President of the Commission, who, by virtue of Article 3 of the aforementioned Decision No. 92/96/COM, directs and coordinates the operation of the Commission's services.

The Court must therefore reject this plea as unfounded.

2) No fault

The applicant produced two medical certificates which did not cover Wednesday 27 December 2000 and Friday 05 January 2001, which are nonetheless working days. In addition, the applicant did not inform his superior of his poor state of health so that the latter could know the reasons why he had not returned to work and the probable date on which he could return.

Finally, Mr TAVARES, who claims to have tried in vain to meet his line manager when he returned to work, has not deigned to respond to a request for an explanation other than by simply sending medical certificates to his line manager.

Mr Jean-Baptiste TAVARES has, by his absence, committed a fault within the meaning of article 34 of Regulation no. 02/95/CM of 1<sup>er</sup> August 1995, which states that: "**Any breach of the obligations to which a member of staff is subject, under the present Conditions of Employment and the regulations adopted for their application, shall render him liable to disciplinary action...**".

The Court must reject this second plea as unfounded.

In view of the foregoing, we consider :

- that the Court should declare the action brought by Mr Jean-Baptiste TAVARES inadmissible for having been brought out of time;
- that, if it declares the application admissible, it must reject it, since the pleas raised by the applicant are ill-founded;

- finally, the Court should order the Commission of the WAEMU to pay the costs.

**The Advocate General**

**Kalédji AFANGBEDJI**

## **JUDGMENT OF THE COURT**

**08 May 2002**

**Between**

**Mr Jean-Baptiste TAVARES And**

**The WAEMU Commission**

The Court, composed of Mr Yves D. YEHOUESSI, President; Ms Ramata FOFANA, Judge-Rapporteur; Mr Mouhamadou NGOM, Judge; Mr Kalédji AFANGBEDJI, Advocate General; Mr Raphaël P. OUATTARA, Registrar;

**delivers this judgment :**

**Considering that** by application dated 10 September 2001, registered at the Registry of the WAEMU Court of Justice under No. 01/2001 of 10 September 2001, Mr Jean-Baptiste TAVARES, contract agent, Macro Economist in the Economic Policy Department of the WAEMU Commission, through his counsel Maître Bénéwendé S. SANKARA, Lawyer at the Court of Appeal of Ouagadougou Burkina Faso, lodged an appeal for the annulment of decision n°01-27/SP/PC of 15 March 2001 which imposed a seven (7) day lay-off for unjustified absence;

**Considering that** the applicant states that he was granted leave of absence from 22 to 26 December 2000 to travel to Abidjan in Côte d'Ivoire ;

**that he** was due to return to duty on 27 December 2000, but that he contracted an illness and was treated by Dr Michel Bosson in Abidjan;

**he** did not return to work until 8 January 2001, i.e. twelve (12) days later; when he returned to work, he tried in vain to meet his line manager to explain his absence;

**that** on 11 January 2001 he received a written request for an explanation from the Commissioner in charge of the Economic Policy Department (DPE) concerning his absence from work;

**in** response to this request for an explanation, on 16 January 2001 he submitted two (2) medical certificates dated 28 December 2000 and 02 January 2001 to justify his absence;

**that** on 15 March 2001, by letter No. 01-27/SP/PC, the President of the WAEMU Commission served him with a decision to lay him off for seven (7) days for unauthorised absence from 27 December 2000 to 8 January 2001;

**that** on 04 May 2001, he lodged an informal appeal for the annulment of the disciplinary sanction with the Chairman of the Commission, who by letter dated 22 May 2001 rejected the said appeal;

on 11 June 2001, he again applied to have the decision annulled, but this second application was rejected;

**that** it therefore brought an action before the Court of Justice on 10 September 2001 asking the Court to :

- 1) purely and simply annul the decision to lay him off for lack of competence on the part of the person responsible for the main proceedings and, in the alternative, annul the decision for lack of fault;
- 2) order the return of the balance of his seven (7) days' salary arbitrarily withheld;
- 3) order the WAEMU Commission to pay him one (1) symbolic franc in damages;
- 4) order the WAEMU Commission to pay all the costs;

In support of his action, Mr Tavares submits that the decision of the President of the Commission is unlawful because it infringes Article 38 of Regulation No 02/95/CM of 1<sup>er</sup> August 1995 laying down the Conditions of Employment of Non-Permanent Staff of the European Union;

he points out that, on the one hand, there can be no sanction for justified acts and that, on the other hand, the author of the decision whose annulment is sought was not competent to take it;

**Considering that in** reply to these pleas, the defendant argued that Mr TAVARES' arguments could not withstand the rigour of legal analysis in terms of both form and substance;

as a matter of form, the appeal lodged on 10 September 2001 is inadmissible because the pre-litigation appeal was lodged out of time;

**that** if the Court were unable to declare the application admissible, it would have to reject it on the merits as being ill-founded, because on the one hand the provisions of Article 38 invoked make it possible to convince oneself of the legality of the decision and, moreover, it is a fundamental principle that whoever can do more can do less; and on the other hand the applicant himself acknowledges that his absence on 05 January 2001 was unjustified;

**that** this admission of partial justification for his absence legitimises the penalty imposed;

**Considering that, in response to** these rebuttals, the applicant replied on 27 December 2001, confirming the arguments contained in his application and adding a new point based on the illegality of the double penalty;

he points out that, according to a basic principle of law, a single offence cannot give rise to a double sanction, whereas he was given a suspension and a salary deduction of three hundred and one thousand eight hundred and fifty three (301,853) CFA francs;

**Considering** that at the hearing on 27 March 2002 during the oral proceedings, the defendant pointed out, after the reading of the final report by the judge-rapporteur, that reference had been made to a letter dated 4 May 2001 of which he had not been aware, as it was not in the file sent to him;

**Considering** that this letter, that of 22 May 2001, as well as the copies of the medical certificates requested by the judge-rapporteur during the proceedings were not communicated to the defendant in accordance with the provisions of article 26 of the Rules of Procedure;

since the applicant intended to avail himself of the letter of 04 May 2001, it appeared necessary to refer the case back to the defendant for communication of documents;

**Whereas** by letter dated 27 March 2002, the Registrar of the Court notified Mr Harouna SAWADOGO, Counsel for the Commission, of the documents requested by the Judge-Rapporteur and Mr Bénéwendé SANKARA of the full copies of the medical certificates;

**Considering that** by supplementary memorandum dated 02 April 2002, the respondent asked the Court to declare inadmissible Mr TAVARES' action for annulment of 10 September 2001 on the grounds that it was time-barred, on the grounds that the applicant had not complied with the prerequisite for referral to the Joint Consultative Arbitration Committee provided for by Articles 108 and 112 of Regulation No 01/95/CM of 1<sup>er</sup> August 1995 on the Staff Regulations of Officials of the Union;

**Considering that** on 05 April 2002 the applicant replied to this additional memorandum, stating quite rightly that he is not a civil servant and is therefore not covered by the provisions of Regulation no. 01/95/CM of 1<sup>er</sup> August 1995 on the status of WAEMU civil servants; that, in fact, it is clear from the file that the applicant was recruited as a non-permanent employee covered solely by the provisions of Regulation no. 02/95/CM;

**Considering that, in** any event, it should be pointed out that the plea put forward by the defendant and based on the failure to comply with the provisions of Articles 108 and 112 of Regulation No 01/95/CM of 1<sup>er</sup> August 1995 on the Staff Regulations of Officials of the Union is new and must be declared inadmissible by application of the provisions of Article 31 paragraphs 2 and 3 of the Rules of Procedure;

Whereas the Court must rule on its jurisdiction to hear this case and on the admissibility of the action before examining the pleas in law of the parties after having put the questions which it is called upon to answer ;

**Considering** that the Court's jurisdiction in this case is enshrined in Article 16 of Additional Protocol No. 01, Article 15 of the Rules of Procedure and Article 61 of Regulation No. 02/95/CM of 1<sup>er</sup> August 1995 on the Conditions of Employment of Non-Permanent Staff of the European Communities;

**that** Mr Jean-Baptiste TAVARES is a member of the contract staff; that he is covered by the Conditions of Employment of Non-Permanent Staff of the European Union, as laid down by Regulation No 02/95/CM of 1<sup>er</sup> August 1995;

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

- the appeal was lodged in accordance with the provisions of Article 26 of the Rules of Procedure and that the appellant paid a security deposit of twenty thousand (20,000) CFA francs pursuant to Order No 01/2001 of 03 October 2001 fixing the security deposit;
- On the other hand, as far as the time limit for referral is concerned, Article 61 of Regulation No. 02/95/CM on the conditions of employment of non-permanent staff of the WAEMU has not been complied with, in particular the third paragraph, which provides as follows:

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

- from the date of publication of the decision ;
- the date of notification to the employee concerned;
- from 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".

**Considering that** the request was lodged on 10 September 2001, against a decision taken on 15 March 2001 which was the subject of an informal appeal on 04 May 2001, an appeal which received a negative response on 22 May 2001;



**that** Mr TAVARES had two (2) months from the date of 22 May 2001 to lodge his appeal;

**Considering, however, that since that** date he has instead lodged a second informal appeal on 11 June 2001, to which no response has been received;

**Whereas** neither the rules governing the jurisdiction of the Court, nor those governing its referral to the Court, nor those laying down the Staff Regulations of Officials of the European Communities provide for a second hierarchical appeal; whereas, moreover, it is a settled principle of law that an administrative appeal is subject to the time-limit for bringing an action only once;

**Considering that**, contrary to the applicant's assertions, the request of 04 May 2001 is indeed an informal appeal and not a statement of facts;

**that** Mr TAVARES has, by this application, clearly sought the annulment of the decision to lay him off which was imposed on 15 March 2001;

**that** the reply of the President of the Commission of 22 May 2001 is an explicit rejection decision, giving the right to lodge an appeal within a period of two (2) months, in accordance with the provisions of article 59 of Regulation n°02/95, i.e. by 23 July 2001 at the latest;

since the appeal was lodged on 10 September 2001, i.e. more than 27 days later, Mr TAVARES is precluded from bringing it and his application must be declared inadmissible;

**Considering** that even if the reply of 22 May 2001 was not notified to the applicant on the same date, it was notified before 11 June 2001, since the interested party exercised his second informal appeal by letter of 11 June 2001;

**that** this letter, which refers to the reply given by the President of the Commission on 22 May 2001, suggests that TAVARES was aware of it on that day;

**that he** therefore had two (2) months from 11 June 2001 to lodge his application, i.e. by 12 August 2001 at the latest;

by bringing an action before the Court on 10 September 2001, Mr TAVARES incurred a foreclosure, and his 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 Jean-Baptiste TAVARES' appeal inadmissible;
- Orders UEMOA to pay the costs.

