

Kossi Mawuli AGOKLA

against WAEMU

Commission

"Action for assessment of the legality of a Commission decision and for payment of compensation".

Summary of the judgment

An appeal shall not be validly lodged with the Court unless the person concerned has previously lodged a complaint with the Joint Advisory Committee.

The introduction of a contentious appeal is conditional on the exercise of a contentious procedure in accordance with the statutory provisions, this formality being substantial.

In addition, as a rule, the submissions made by civil servants in their appeals must have the same purpose as those set out in the prior administrative complaint and must contain points of contention based on the same grounds as those in the complaint.

This compliance is a matter of public policy.

REPORT BY THE JUDGE-RAPPORTEUR

By application dated 7 January 2002, registered at the Registry of the UEMOA Court of Justice on 9 January 2002 under No 01/2002, Mr Kossi Mawuli Agokla, formerly Director of the Secretariat of the UEMOA Commission, through his counsels Mr Dabiré, Sorgho, Toé and Mamadou Ouattara, lawyers at the Court of Ouagadougou, Burkina Faso, brought an action for an assessment of the legality of Decision No 503/2001/PC-UEMOA dated 16 July 2001, terminating his duties with the Commission and for payment of the sums of :

- 171,424,475 F in respect of career losses,
- FRF 193,475,000 in respect of non-material loss,

i.e. a total of FRF 364,899,411.

I. THE FACTS

The facts of the case, as set out by the applicant and not disputed by the defendant, are as follows:

Mr Agokla was recruited as a senior executive in charge of the Commission's Secretariat by decision of 19 February 1996, and was subsequently appointed Director of the Commission's Secretariat on 24 October 1996.

On 16 July 2001, by Decision No. 503/2001/PC/WAEMU, Mr Agokla was dismissed for: "serious misconduct consisting in the communication to third parties, without authorisation, of correspondence and information of which he was aware in his capacity as an official of the Union, which were not made public".

On 18 July 2001, in accordance with Article 107 of Regulation No. 01/95/CM of 1^{er} August 1995 on the Staff Regulations of Officials of the WAEMU, Mr Agokla lodged an appeal with the President of the Commission, requesting that the decision to dismiss him be rescinded.

Mr Agokla, having received no response to his informal appeal, decided to take his case against the Commission to the Court of Appeal.

The appeal was served on the Chairman of the Commission by letter dated 18 February 2002.

By letter dated 28 February 2002, the latter informed the Court of the appointment of the Commission's agent in the person of Mr Eugène Kpota, the Commission's Legal Adviser.

On the report of the Judge-Rapporteur, the Advocate General having been heard, the Court decided to open the oral procedure without prior investigative measures. It did, however, invite the WAEMU Commission to produce two documents, in particular No. 406 of 19 June 2001 of the newspaper l'Indépendant, and the opinion of the Advisory Disciplinary Committee dated 4 July 2001.

II. SUBMISSIONS OF THE PARTIES

Mr Agokla claims that the Court should:

- rule that Decision No 503/2001/PC/WAEMU of 16 July 2001 dismissing him is unlawful;
- in any event, declare the said decision unfounded;
- consequently, order UEMOA to pay it the total sum of 364,899,412 francs as compensation for the loss suffered;
- order UEMOA to pay the costs.

The Commission claims that the Court should:

in the form :

to the principal

- rule that Mr Agokla's appeal did not satisfy the requirements of Articles 108 and 112 of Regulation No 01/95/CM laying down the Staff Regulations of Officials of the European Union;

accordingly

- declare the said action inadmissible;

alternatively

- take note of the applicant's request that the Court of First Instance declare that the decision is unlawful and draw the legal conclusions therefrom at the same time as ordering the Commission to pay compensation for the damage suffered ;

accordingly

- declare the said action inadmissible on the ground that it is unfounded;

on the merits, in the alternative,

- reject the pleas put forward by the applicant;

accordingly

- Dismiss all his claims as unfounded;
- order it to pay all the costs.

III. PLEAS AND ARGUMENTS OF THE PARTIES

1) Admissibility of the action

A) Pleas in law and arguments of the Commission

By memorandum dated 16 April 2002, the WAEMU Commission, which claims that both the contentious action and the action for damages are inadmissible, submits that:

- firstly, that the applicant misapplied the provisions of Articles 107 and 112 of Regulation No 01/95/CM laying down the Staff Regulations of Officials of the WAEMU by mistakenly referring to Article 107, which does not impose a mandatory prior appeal governed by the provisions of Article 108 of the said Regulation;
- secondly, that Mr Agokla's appeal of 18 July 2001 to have the decision to dismiss him rescinded should be addressed to the Joint Arbitration Advisory Committee and not to the appointing authority, which is the President of the WAEMU Commission.

According to the Commission, the prior appeal provided for in Article 107 concerns the case of an official who does not have a decision and who wishes to obtain one. The irregular and untimely referral of the case to the Chairman of the Commission does not exempt Mr Agokla from the mandatory prior appeal provided for in Article 108.

The WAEMU Commission, which also points out that the claimant has brought an action for assessment of legality, further explains that the consequence of the illegality of an act being its annulment, it is therefore clear that the court in question is seised at the same time of an action for annulment and an action for compensation.

Finally, it considers that neither its statutes nor its rules of procedure confer on the Court the power to order, at the same time, the annulment of an act and the payment of sums of money as compensation for the damage suffered as a result of the act in question.

What about the applicant's means?

B) Pleas in law and arguments of the applicant

The applicant seeks rejection of all the pleas put forward by the Commission.

In his reply dated 14 May 2002, he argues that it is not correct to state, as the Commission does, that the remedy provided for in Article 107 of Regulation No 01/95/CM applies only to officials who do not have a decision and who wish to obtain one.

He added that this interpretation was not that of the WAEMU Court of Justice which, in cases already decided, had declared admissible the requests of the civil servants concerned, whose appeals had been addressed to the President of the WAEMU Commission and not to the Arbitration Advisory Committee.

He pointed out that the said Committee had not yet been set up and that the Commission had no right to reproach him for not having referred the matter to a body that did not exist through his own fault.

He also stated that he had lodged a full appeal with the Court, the purpose of which was to determine whether his dismissal was unfair and, if so, to set the amount of his compensation.

It therefore considers that it cannot be denied to the compensation judge to draw conclusions from the imperfection of any material or legal act in order to assess the damage resulting from it with a view to compensating the harm it has caused; that compensation is justified whenever there is a causal link between the imperfection of the act complained of and the harm caused.

C) The Commission's response

By rejoinder dated 8 June 2002, the WAEMU Commission considered that accepting the application of Article 107 of Regulation No 01/95/CM/UEMOA of 1^{er} August

1995, in this case, would be tantamount to duplicating the provisions of Articles 108 and 112 of the said regulation.

It also points out that, in the absence of an ex gratia complaint relating to any payment of a sum of money as a prior, compulsory and unavoidable remedy, the claimant's action for compensation must still be declared inadmissible.

It also added that the applicant had not shown any diligence in bringing the matter before the Joint Arbitration Advisory Committee, even though Article 112 of the Rules of Procedure requires that this prerequisite be fulfilled in order for the matter to be properly brought before the Court of Appeal.

It further submits that even if the claimant's claim that it was impossible to refer the matter to the Joint Arbitration Advisory Committee is upheld, it is clear that the action is still inadmissible.

Lastly, the Commission states that it is settled case law that an action for annulment and an action for damages cannot be entertained by the Court of Appeal as they stand, and that the autonomy between the action for annulment and the action for damages precludes any procedural amalgam between these two actions and entails the inadmissibility of any action brought on both grounds.

2) At the back

A) Applicant's means

After invoking the provisions of article 72 of Regulation no. 01/95/CM of 1^{er} August 1995 on the status of WAEMU civil servants, the applicant pointed out that, with regard to the said provisions, his dismissal, a second-degree sanction, took the form of a disciplinary measure.

He submits that, under Article 86 of the aforementioned Regulation, dismissal must comply with the rules laid down in Article 76 of the Staff Regulations when it is envisaged as a disciplinary sanction.

Again according to the applicant, it follows from the provisions of Article 76 that "second-degree sanctions shall be imposed by the appointing authority, on a proposal from the authority responsible for human resources management and after obtaining the opinion of the Disciplinary Advisory Committee".

He deduced that the decision to dismiss him taken by the President of the Commission had not been preceded by a proposal from the authority responsible for human resources management, in this case the Director of Administrative and Financial Affairs.

He emphasised that even though the matter had been referred to the Chairman of the Disciplinary Advisory Board, the fact remained that the matter had been referred in breach of Article 78 of Regulation 01/95/CM, which stipulates that the matter shall be referred to the Board referred to in Article 70 by means of a report from the competent authority setting out the facts of which the official is accused and the penalty envisaged.

He points out that nowhere in the aforementioned referral report is there any mention of dismissal as a possible or envisaged sanction against him.

He believes that the decision to dismiss him is flawed, irregular and unjustified.

The applicant further contends that his dismissal was all the more unjustified and unfair in that the President of the Commission was never able to prove that he was responsible for the acts of which he was accused.

Seeking an order that the WAEMU Commission pay him the total sum of 364,899,412 francs as compensation for both the material and non-material damage suffered, the applicant stated in this regard that the decision taken against him by the President of the Commission was based solely on the intention to harm him.

He pointed out that a series of facts had previously been attributed to him in preparation for his dismissal.

He was initially wrongly suspected of stealing office furniture delivered to the Commission.

Then, in April 2001, he was accused of fraudulently submitting for the signature of the Chairman of the Commission a request for exemption from duties and taxes for the purchase of 20,000 litres of fuel.

Lastly, he considers that his dismissal was so expected that the Chairman of the Commission did not consider it normal to refer the matter to the Disciplinary Advisory Board on a regular basis, and that the grounds for his dismissal were not established, but were also, and above all, likely to damage his reputation.

B) Pleas in law of the defendant

The WAEMU Commission first points out that, in any event, in the absence of a manifest error as to the accuracy of the facts, the Court of First Instance cannot review the assessment made by an administrative authority of an organ of the Union as to the state of service of a member of staff.

It added that as the applicant's dismissal had not been annulled or annulled on the basis of the action for compensation, the damage caused to Mr Agokla could not be based on the heads of claim as presented by him, but rather on the damage arising exclusively from the Commission's administrative malfunction.

In order to establish that the applicant was guilty of serious misconduct and to justify the validity of the contested decision to dismiss him, the WAEMU Commission relies on the following elements:

- the press article in which Mr Agokla's name and former position were expressly mentioned;
- the reproduction in inverted commas in the said press article of passages from Mr Agokla's reply to the request for an explanation sent to him concerning the theft of furniture from the Commission's premises, a reply that only Mr Agokla and the President of the WAEMU Commission were supposed to have;
- the strictly confidential nature of the exchange of said correspondence between the parties;

- the report in the said press article of other specific facts relating to the file on the "20,000 litres of fuel" fraudulently submitted for the signature of the President of the Commission, with details of the circuit followed by the files in the Directorate of the Secretariat of the President of the Commission and the detailed manner in which Mr Agokla was relieved of his duties.

Again according to the Commission, on reading the said press article, its Chairman sent a request for an explanation to Mr Agokla, who replied that "he had no explanation on the matter".

In any event, the Commission considers that Mr Agokla, who gave a terse reply to the request for an explanation, and who did not contest that he was the source of the information communicated to the press organisation, thus committed a clear breach of Article 8 of Regulation No 01/95/CM/UEMOA of 1^{er} August 1995 on the Staff Regulations of Officials, relating to the right of reserve and professional secrecy.

The Judge-Rapporteur :

Mouhamadou NGOM

OPINION OF THE ADVOCATE GENERAL

I. THE FACTS GIVING RISE TO THE ACTION

By application dated 7 January 2002, registered on 9 January 2002, Kossi Mawuli AGOKLA, through his lawyers, Maîtres Bernadin DABIRE and Mamadou OUATTARA, lodged an appeal against the decision of the President of the WAEMU Commission, who dismissed him from office on 16 July 2001.

AGOKLA was recruited on 19 February 1996 by the Commission of the West African Economic and Monetary Union (WAEMU) as a senior official in charge of the Commission's secretariat, and was appointed Director of the secretariat on 24 October 1996. He is an official of the Union and as such is subject to Regulation No. 01/95/CM of 1^{er} August 1995 on the Staff Regulations of Officials of the WAEMU.

By letter n°01-031/SP/PC dated 11 April 2001, the President of the Commission asked him to explain a request for exemption from duties and taxes and a destination certificate which were submitted for his signature and which concerned the acquisition of twenty thousand (20,000) litres of fuel.

In a letter dated 14 April 2001, he replied to the President of the Commission, denying his responsibility in the matter.

On 17 May 2001, the President of the Commission referred to the Chairman of the Advisory Disciplinary Committee the facts of "attempted misappropriation of tax-free, duty-free fuel" against the applicant and two other UEMOA employees.

By letter no. 01-038/SP/PC of 21 June 2001, the same authority asked Mr AGOKLA to explain the disclosure of activities relating to the internal workings of the Commission in a local newspaper, "l'Indépendant", in issue no. 406 of 19 June 2001 (a copy of which was given to the applicant).

On 25 June 2001, the President of the Commission again referred to the Chairman of the Advisory Disciplinary Committee the facts of disclosure of correspondence and information of an administrative nature, breach of professional secrecy and discrediting of WAEMU committed by the applicant (article 8 of Regulation no. 01/95/CM of 1^{er} August 1995 cited above).

The Disciplinary Advisory Committee reportedly gave its opinion on 4 July 2001; however, this document is not in the file.

By Decision No 503/2001/PC/COM dated 16 July 2001, the President of the Commission dismissed the applicant for serious misconduct "consisting in the communication to third parties, without authorisation, of correspondence and information of which he was aware, in his capacity as an official of the Union, and which were not made public".

On 18 July 2001, the applicant asked the President of the Commission (the appointing authority), free of charge, to reconsider his decision, but when the President did not react, he challenged the decision to dismiss him before the Court.

II. SUBMISSIONS OF THE PARTIES

In his application, the applicant claims that the Court should :

1°) declare that the decision to dismiss is unlawful and in any event ill-founded;

2°) order the Commission to pay him :

for economic and material loss: one hundred and seventy-one million four hundred and twenty-four thousand four hundred and twelve (171,424,412) CFA francs, broken down as follows:

- FCFA 615,662 (additional salary for July, from 19 to 31 July 2001, i.e. 13 days) ;
- FCFA 7,103,750 (salary for the remaining five months of 2001, from August to December) ;

- FCFA 153,441,000 (salary from 2002 to 2010, i.e. nine (9) years) ;
- FCFA 265,000 (cumulative statutory advances) ;
- FCFA 10,000,000 (end-of-career allowance) ;

for non-material damage: one hundred and ninety-three million four hundred and seventy-five thousand (193,475,000) CFA francs;

a total of three hundred and sixty-four million eight hundred and ninety-nine thousand four hundred and twelve (364,899,412) CFA francs;

3°) order the WAEMU Commission to pay the costs.

The defendant claims that the Court should:

- 1°) declare the action inadmissible,
 - 2) in the alternative, dismiss it as unfounded; 3)
- order the applicant to pay the costs.

III. PLEAS AND ARGUMENTS OF THE PARTIES

The applicant claims that the decision to dismiss him is vitiated by formal and substantive irregularities:

Irregularities of form based on the violation of the provisions of articles 76 and 78 of Regulation n°01/95/CM of 1^{er} August 1995, in that, on the one hand, the decision taken being a disciplinary sanction of the second degree should have been supported by a proposal for a sanction from the authority in charge of human resources management and in that, on the other hand, the report of the President of the Commission (the competent authority) referring the matter to the Disciplinary Advisory Committee should have indicated a sanction against the applicant; that by evading these formalities, the decision lacks any legal basis.

Substantive irregularities in that the grounds for his dismissal were unfounded, since he was completely unaware of the facts attributed to him, which, moreover, could not be proven by his employer; his dismissal was in fact the result of premeditated acts by the Commission; that he had previously been accused of theft of office furniture which had not yet been clarified, that, notwithstanding this, the President of the Commission, moved by a malicious intention to harm him, still attributes to him responsibility for the publication (through the newspaper l'Indépendant, No. 406 of 19 June 2001), of the content of administrative documents subject to professional secrecy and relating to the theft of WAEMU office furniture and to the affair of the twenty thousand (20,000) litres of tax-free fuel; that these actions by the Commission highlight the illegal nature of the sanction.

Lastly, the applicant emphasised that the unlawfulness of the decision had adversely affected him and caused him harm throughout his career, for which he sought compensation.

In its statement of defence dated 16 April 2002, the defendant put forward the following arguments against the applicant:

1) Admissibility of the action

The defendant submits that the action is formally inadmissible because :

- the claimant should first refer his complaint to the Joint Consultative Arbitration Committee (hereinafter referred to as the CCPA) (instead of the appointing authority) as he is required to do by Article 108 of Regulation No. 01/95/CM on the status of civil servants, which would thus be violated;
- the appeal is not validly brought before the Court in the absence of prior referral to the CCPA by the applicant, which would constitute a breach of Article 112 of Regulation No 01/95/CM;
- the applicant had asked the Court to rule that the decision to dismiss him was unlawful and unfounded, and therefore to assess the lawfulness of that decision, and at the same time to award pecuniary compensation; that this would be tantamount to bringing an action for annulment and an action for compensation before the Court at the same time, whereas the Articles of Association and the Rules of Procedure

of that court give it no jurisdiction to rule at the same time on the legality of a Community act and on financial compensation; that an action for damages should only be the counterpart of an action for annulment where the Commission refuses to draw the possible consequences of the annulment of its decision.

2) Background

The defendant considers that the applicant's claims (FCFA 171,422,412 and FCFA 193,475,000 respectively for material and non-material damage) would only be justified if the contested decision had first been annulled and it (the defendant) had then refused to reinstate the applicant. It maintained that its liability necessarily presupposes misconduct in the organisation of services, the communication of inaccurate information, management errors, and failure to observe health and safety rules; this sufficiently obvious misconduct must result in direct and certain damage; in the present case, the elements characterising such misconduct against it or a manifest error of assessment of the facts have not been adduced; consequently, the action should be dismissed and the applicant ordered to pay the costs.

In reply to the Commission's arguments set out above, the applicant points out, first, that the ACFA was not set up and that the defendant cannot therefore criticise it for not having submitted the complaint to a body that does not exist and, second, that since his action is an action in full and not an action for annulment, the court awarding compensation cannot be denied the right to draw the consequences of the imperfection of any material or legal act in order to assess the damage resulting therefrom.

In its rejoinder, the defendant reiterates, on the basis of the same grounds as in its statement of defence, that the action is inadmissible or ill-founded; it states that the application for an injunction lodged on 18 July 2001 by the applicant concerns only the withdrawal of the decision to dismiss him and not the payment of compensation and that, in the absence of a prior and mandatory application for an injunction, the action for compensation must be declared inadmissible; lastly, the applicant would still be precluded from bringing an action before the Court, since the decision to dismiss had been notified to him on 18 July 2001, and he had until 19 September 2001 to bring his action before the Court; he did not bring his action until 7 January 2002.

IV. LEGAL DISCUSSION

A. Pleas as to form

The defendant submits that the appeal did not comply with the pre-litigation procedural rules because it did not satisfy the conditions laid down in Articles 108 and 112 of Regulation No 01/95/CM on the Staff Regulations of Officials, firstly because the applicant failed to submit his complaint to the ACFA beforehand and secondly because the Court was not properly seised of the matter in the absence of that formality.

The combined provisions of the two articles establish that, in the context of disputes involving the Community civil service, any official may submit to the ACFA a complaint concerning an act of the Appointing Authority which adversely affects him, either where the authority has taken a decision or where it has failed to take a measure required by Community rules.

The dispute falls within the jurisdiction of the Court; however, the Court has jurisdiction to hear it only if the official has previously lodged a complaint with the ACFA and if that complaint has been explicitly or implicitly rejected in whole or in part by the Appointing Authority, unless the official has lodged, at the same time as his main action, a request for a stay of execution of the contested act, in which case the execution of the contested act is suspended (Article 72 of the Rules of Procedure of the Court and 109 of Regulation No 01/95/CM).

The civil servant is required to implement and comply with a mandatory set of pre-litigation formalities (articles 107 to 111 of Regulation No. 01/95/CM):

- the official must ask the Appointing Authority to take a decision on the matter;
- the Appointing Authority has four (4) months in which to act; if it does not act, this constitutes an implied decision rejecting the application, which may give rise to a complaint by the official to the ACFA ;
- The CCPA has one (1) month from the date of referral to give its opinion;

- the Appointing Authority has three (3) months from the date of this notice to take a decision;
- on expiry of the period of four (4) months following the lodging of the complaint, failure to reply to the complaint shall be deemed to constitute an implied decision rejecting it, which may give rise to an appeal to the Court.

The claimant argues that he was unable to lodge a complaint with the ACFA because the body had not been set up; this argument cannot be supported, because the body exists under the Articles of Association and it is up to the claimant to prove that it is ineffective by lodging a complaint.

It is therefore common ground that the applicant failed to refer the matter to the ACFA; his action should be dismissed on the grounds set out in Articles 108 and 112 of Regulation No 01/95/CM, which are a matter of public policy and are therefore binding on the Court and the parties; it follows that the action must be declared inadmissible in its entirety, including the claim for damages.

In this respect, it should be recalled that in the case of *Abdourhamane Sacko v. Commission*, subject of Judgment No. 02 of 29 May 1998, the Court rejected the objection raised by the Commission, which claimed that it had been unable to consult the Advisory Committee on Recruitment and Advancement due to the unavailability of its members.

The Court of First Instance of the European Communities has consistently held that "an action brought by an official before the Court of First Instance must be declared inadmissible if the pre-litigation procedure has not been properly conducted" (Order of 25 March 1998 - paragraph 22 - *European Court Reports 1998 - Part II*, page 511, *Koopman v Commission*).

The defendant also submits that the Court lacks jurisdiction to deal simultaneously with the legality of a Community measure and an action for damages.

The action for assessment of legality (action for annulment) provided for in article 27 paragraph 3 of the Court's statutes and the action for damages, which has its legal basis in article 27 paragraph 6 of the same statutes, are independent of each other; article 27 paragraph 6 of the Court's statutes does not apply to actions for damages.

15, 2^e and 15, 4^e of the Rules of Procedure still enshrine this autonomy; however, it has been recognised that an official may bring and combine the two actions depending on his interests (ECJ judgment of 22/10/1975 Meya BURCKHARDT v Commission - ECR page 1171).

Nothing in these organic texts prohibits an individual from bringing an application for annulment and compensation before the Court, let alone the Court hearing it; although, it should be pointed out, the present action is not an annulment. The plea is therefore inoperative.

As for the applicant, he claimed that the provisions of Articles 76 and 78 of Regulation No. 01/95/CM of 1^{er} August 1995 had been violated, respectively, by the fact that the contested decision had been taken without the authority responsible for human resources management having first proposed a sanction (in the case of a second-level disciplinary sanction) and without the appointing authority having indicated a sanction in the report which it had submitted to the Disciplinary Advisory Committee; these defects constituted an irregularity in the form of the decision.

The applicant then asked the Court to rule that the dismissal was formally unlawful.

Articles 76 and 78 state respectively that second-level disciplinary sanctions, including dismissal, are imposed by the appointing authority on a proposal from the human resources authority and after consulting the Disciplinary Advisory Committee, and that the matter is referred to the Committee by a report from the appointing authority stating the facts of which the official is accused and the sanction envisaged.

The authority responsible for human resources management was ignored when the decision was taken and could have proposed a different penalty if it had been consulted; the report in question did not propose any penalty for the applicant either; he was deprived of the statutory and security guarantees provided by the aforementioned articles.

Do the omissions of these formalities constitute irregularities affecting the validity of the decision to dismiss?

In its aforementioned ruling No. 02 of 29 May 1998, the Court ruled that *"the legislator intended to place it (the Advisory Committee on Recruitment and Advancement) on the same footing as the other statutory guarantees offered to civil servants; it follows that the obligation imposed on*

the appointing authority to consult it prior to taking decisions falling within its sphere of responsibility constitutes a substantial formality, the omission of which renders the act null and void".

On the basis of this case law, the Court should regard as substantial the formalities introduced by Articles 76 and 78, which are intended to secure and safeguard the rights of civil servants; a dismissal decision which has disregarded these formalities is in principle vitiated by a formal defect; the Court should therefore decide that it is unlawful, but two major obstacles could stand in the way of this:

1°) the present appeal is not an appeal on grounds of illegality, still less an appeal for annulment, but an appeal in full contentious proceedings;

2°) the decision to dismiss has become final (expiry of appeal procedures).

However, French civil service law, which serves as a reference for our various national civil service laws, teaches that, although a plea based on the illegality of a final non-regulatory administrative act is in principle inadmissible, regardless of the nature of the dispute, the rule does contain some exceptions, in particular *"when this illegality is invoked in support of a claim for damages to compensate for the harm caused by the decision"* (cf. *Droit du Contentieux Administratif* by René CHAPUS, 7^e edition pages 576 to 577).

The claimant's request being similar to this specific case of derogation should then be admissible; it should nevertheless be specified that the illegality of a Community administrative act, even if annulled, does not necessarily engage the liability of the Community. Case law requires fault in this respect.

If the Court finds that the objections raised by the Commission as to the admissibility of the action are unfounded, it will have to rule on the merits.

B. Substantive pleas

The Commission criticised the applicant for having disclosed in the Journal l'Indépendant, without authorisation, documents and information of which the applicant had knowledge in his capacity as a UEMOA official, and which had not been made public, and for having discredited UEMOA, in breach of the statutory provisions governing officials of that organisation.

In its letter to the Chairman of the Advisory Disciplinary Committee, it states that elements of the applicant's reply to its request for explanations had been reproduced in the newspaper in question, even though it and the applicant were the only ones supposed to have them, and that the same newspaper had accused UEMOA of harassing the applicant and had reported with such accuracy the file on the twenty thousand (20,000) litres of fuel - fraudulently submitted for his signature - and the administrative circuit of the files that the applicant's responsibility should be sought.

With regard to the facts on which the disciplinary sanction was based and which were the subject of the request for explanations of 21 June 2001 from the President of the Commission, the applicant simply replied on 22 June 2001 *"that he did not have any explanations on the matter"*.

Despite his objections, the claimant has not produced any material evidence to show that the Commission was at fault in relation to the facts of which he is accused.

He claims to have suffered damage as a result of unlawful conduct on the part of the Commission; nor has he established a causal link between that damage and that unlawful conduct. Finally, the formal irregularities noted in the preparation of the decision cannot give rise to liability on the part of the Commission, as long as the Commission has not been found to be at fault for the damage allegedly caused.

The claimant did not establish to the requisite legal standard that the reasons for the contested decision were "irrelevant"; the facts that justified his dismissal therefore remained convincing and legitimate.

It has been ruled "that the mere fact of an official publishing, without having sought the prior authorisation of the appointing authority, a work the subject of which relates to the activities of the Communities, constitutes a breach of Article 17 of the Staff Regulations which may be the subject of a simple material finding" (ECJ judgment of 6/3/2001 - Case C273/99P Bernard Connolly v Commission).

It follows from the foregoing that the substantive pleas put forward by the appellant cannot succeed and that the action must therefore be dismissed as unfounded.

We conclude that the action must be declared inadmissible, but that if the Court were to decide otherwise, it would have to dismiss it.

The costs advanced by the Commission shall be borne by it, pursuant to Article 61 paragraph 1 of the Rules of Procedure of the Court.

The First Advocate General :

Malet DIAKITE

JUDGMENT OF THE COURT

December 18, 2002

Between

Mr Kossi Mawuli AGOKLA And

The WAEMU Commission

The Court, composed of Mr Yves D. YEHOUESSI, President; Mr Mouhamadou NGOM, Judge-Rapporteur; Ms Paulette Badjo EZOUEHU, Judge; Mr Malet DIAKITE, First Advocate General; Mr Raphaël P. OUATTARA, Registrar;

delivers this judgment :

Whereas by application dated 07 January 2002, registered at the Registry of the WAEMU Court of Justice on 9 January 2002 under No. 01/2002, Mr. Kossi Mawuli Agokla, formerly Director of the Secretariat of the WAEMU Commission, through his counsel Mr. Dabiré, Sorgho et Toé and Me Mamadou Ouattara, Avocats à la Cour de Ouagadougou, Burkina Faso, brought an action for an assessment of the legality of Decision No 503/2001/PC/UEMOA dated 16 July 2001, terminating his duties with the Commission and for payment of the sums of :

- FRF 171,424,475 in respect of career losses,
- FRF 193,475,000 in respect of non-material damage,

i.e. a total of 364,899,411 francs;

In fact

I. FACTS AND PROCEDURE

Whereas the facts and arguments put forward by the parties during the written procedure may be summarised as follows :

Mr Kossi Mawuli Agokla was recruited as a senior official in charge of the Secretariat of the Commission by Decision No 16/96/PCOM of 19 February 1996 and was subsequently appointed Director of the Secretariat of the Commission by Decision No 106/96/PCOM of 24 October 1996.

On 16 July 2001, by Decision No. 503/2001/PC/WAEMU , Mr Kossi Mawuli Agokla was dismissed for serious misconduct consisting in the communication to third parties, without authorisation, of correspondence and information of which he had knowledge in his capacity as an official of the Union and which had not been made public.

On 18 July 2001, in accordance with Article 107 of Regulation No 01/95/CM of 1^{er} August 1995 on the Staff Regulations of Officials of the WAEMU, Mr Agokla lodged an appeal with the President of the Commission, requesting that the decision to dismiss him be rescinded. Having received no response to his appeal, he decided to bring his case against the Commission before the Court of Cassation. The appeal was served on the Chairman of the Commission by letter dated 18 February 2002.

By letters dated 28 February 2002, the latter informed the Court of the appointment of its agent in the person of Mr Eugène Kpota, Legal Adviser to the Commission, and of the appointment of Mr Harouna Sawadogo, Avocat, to represent it.

II. SUBMISSIONS OF THE PARTIES

Mr Agokla claims that the Court should:

- rule that Decision No 503/2001/PC/UEMOA of 16 July 2001 dismissing him is unlawful;

- in any event, declare the said decision unfounded;

- order UEMOA to pay it the total sum of 364,899,412 francs as compensation for the loss suffered;
- order UEMOA to pay the costs.

The Commission claims that the Court should:

In form

To the principal

- rule that Mr Agokla's appeal does not satisfy the requirements of Articles 108 and 112 of Regulation No 01/95/CM on the Staff Regulations of Officials of the WAEMU;

accordingly

- declare the said action inadmissible;

Alternatively

- take note of the applicant's request that the Court of First Instance declare that the decision is unlawful and draw the legal conclusions therefrom at the same time as ordering the Commission to pay compensation for the damage suffered ;

accordingly

- declare the said action inadmissible on the ground that it is unfounded;

In the alternative

- reject the pleas put forward by the applicant;

consequently

- Dismiss all his claims as unfounded;

- order it to pay all the costs.

III. PLEAS AND ARGUMENTS OF THE PARTIES

- Admissibility

a) Pleas in law and arguments of the UEMOA Commission

In its statement of case dated 16 April 2002, the WAEMU Commission, which claims that both the action before the Court of First Instance and the action for damages are inadmissible, argues:

- firstly, that the applicant misapplied the provisions of Articles 107 and 112 of Regulation No 01/95/CM laying down the Staff Regulations of Officials of the WAEMU by mistakenly referring to Article 107, which does not impose a mandatory prior appeal governed by the provisions of Article 108 of the said Regulation;
- secondly, that Mr Agokla's application of 18 July 2001 for the decision to dismiss him to be rescinded should be addressed to the Joint Arbitration Advisory Committee and not to the appointing authority, which is the President of the WAEMU Commission.

The Commission added that the prior recourse under article 107 concerns the case of an official who does not have a decision and who wishes to obtain one, and that the irregular and untimely referral to the Chairman of the Commission does not exempt Mr Agokla from the prior recourse under article 108.

It also pointed out that the applicant had brought an action for assessment of legality, while explaining that the consequence of the unlawfulness of an act being its annulment, it was clear that the court in question was seised at the same time of an action for annulment and an action for compensation.

Finally, it considers that neither its statutes nor its rules of procedure confer on the Court the power to order, at the same time, in the event of the annulment of an act, the payment of a sum of money as compensation for the damage suffered as a result of the act in question.

b) Pleas in law and arguments of the applicant

The applicant, who claims that all the Commission's pleas in law should be rejected, points out first of all in his reply dated 14 May 2002 that it is not correct to assert, as the Commission does, that the remedy provided for in Article 107 of Regulation No 01/95/CM concerns only the case of an official who does not have a decision and who wishes to obtain one. Such an interpretation is not that of the Court of Appeal which, in cases already decided, had declared admissible the requests of the civil servants concerned and whose appeals had been addressed to the President of the WAEMU Commission and not to the Joint Consultative Arbitration Committee.

He added that the said Committee had not yet been set up and that the Commission was ill-advised to reproach him for not having referred the matter to a body that did not exist through his own fault.

The claimant stated that he had indeed lodged a full appeal with the Court, the purpose of which was to determine whether his dismissal was unfair and, if so, to set the amount of his compensation.

In this respect, the Court considers that it cannot be denied to the judge responsible for compensation to draw conclusions from the imperfection of any material or legal act in order to assess the damage resulting therefrom with a view to compensating the harm caused. Compensation is justified whenever there is a causal link between the imperfection of the act in question and the damage caused.

c) The Commission's response

In its rejoinder dated 8 June 2002, the Commission considers that accepting the application of Article 107 of Regulation No 01/95/CM/UEMOA of 1^{er} August 1995 in this case would be tantamount to duplicating the provisions of Articles 108 and 112 of the same Regulation.

It states that in the absence of an application for an ex gratia settlement relating to the payment of any sum of money by way of compensation, which is a mandatory and unavoidable prerequisite, the claimant's action for compensation must still be declared inadmissible.

It also found that the applicant had not taken any steps to refer the matter to the Joint Consultative Arbitration Committee, even though Article 112 of the aforementioned Rules requires that such a referral be made to the Court of Appeal before the matter can be properly brought before it.

It considers that it is settled case law that an action for annulment cannot be entertained by the Court of Appeal as it stands, and that the autonomy between the action for annulment and the action for damages precludes any procedural amalgam between these two actions and renders inadmissible any action brought on both grounds.

At the back

The applicant maintained that the decision to dismiss him as a disciplinary measure had not been preceded by a proposal from the authority responsible for managing human resources, in this case the Director of Administrative and Financial Affairs.

He emphasised that even though the matter had been referred to the Chairman of the Disciplinary Advisory Board, the fact remained that the matter had been referred in breach of Article 78 of Regulation 01/95/CM, which stipulates that the matter shall be referred to the Board referred to in Article 70 by means of a report from the competent authority setting out the facts of which the official is accused and the penalty envisaged.

The applicant states that his dismissal is all the more irregular, unjustified and unfair in that the President of the Commission has never been able to prove that he was responsible for the acts of which he is accused.

Turning to the substance of the case, the Commission's first response is that the Court cannot review the assessment made by an administrative authority of a Union body of a staff member's state of service.

In order to establish that the applicant was guilty of serious misconduct and to justify its decision to dismiss him, the WAEMU Commission relies on the following elements:

- the press article in which Mr Agokla's name and former position were expressly mentioned;

- the reproduction in inverted commas in the said press article of passages from the reply by Mr Agokla's response to the request for an explanation of the theft of furniture from the Commission's premises, which only he and the President of the WAEMU Commission were supposed to have, was as follows;
- the strictly confidential nature of the exchange of said correspondence between the parties;
- the report in the said press article of other specific facts relating to the case of the "20,000 litres of fuel" fraudulently submitted for the signature of the President of the Commission, with details of the circuit followed by the files of the Directorate of the Secretariat of the Commission and the detailed manner in which Mr Agokla was relieved of his duties.

The Commission considers that, in any event, Mr Agokla, who gave a terse reply to the request for an explanation and who did not contest that he was the source of the information communicated to the press organisation, thus committed a clear violation of Article 8 of Regulation No 01/95/CM/UEMOA of 1^{er} August 1995 on the status of civil servants and on the obligation of reserve and professional secrecy.

Whereas at the hearing on 30 October 2002 the parties developed the arguments put forward during the written procedure;

Whereas the First Advocate General delivered his Opinion at the same sitting;

In law

Considering that the Court must first rule on its jurisdiction to hear this case, and then on the admissibility of the action, before examining whether the pleas of the parties as to the substance of the case are admissible;

Considering that the jurisdiction of the Court in this case is enshrined in Article 15(5) of Regulation No 01/96/CM laying down the Rules of Procedure of the Court of Justice and Article 112 of the Rules of Procedure of the Court of Cassation.

Regulation No. 01/95/CM on the Staff Regulations of WAEMU Officials and therefore calls for no particular comment;

Admissibility

Considering that, from the outset, it is important to specify that it is clear from the application that the applicant bases his right to compensation on the alleged illegality of the dismissal decision and thus acknowledges that the finding of this illegality and his claim for compensation together form the subject matter of the dispute;

Whereas it is the rule that an action for damages constitutes a legal remedy independent of an action for annulment;

That it was therefore open to the applicant, in view of the autonomy of the various legal remedies, to choose either one or the other, or both together;

That, in any event, both the examination of the application and the debates make it possible to affirm that Mr Agokla now intends to pursue the claim for compensation alone;

Considering that it is then necessary to determine, with a view to ruling on its admissibility, on which provisions Mr Agokla's action must be based;

Considering that it is common ground that Mr Agokla, who has received a decision to dismiss him, nevertheless intended to base his appeal solely on the provisions of Article 107 of Regulation No 01/95/CM, provisions which are applicable only in the case of an official who wishes the appointing authority to take a decision concerning him ;

In view of these observations, the action could only be brought on the basis of Article 108 ;

Considering moreover that it follows from the provisions of Article 112 of Regulation No. 01/95/CM *"that the WAEMU Court of Justice has jurisdiction to hear any dispute between the Union and one of its officials; that, however, the appeal is not validly lodged with the WAEMU Court of Justice"*.

...if the person concerned has previously lodged a complaint with the Joint Advisory Committee...";

In the light of these provisions, it must be held that Mr Agokla's appeal has not been duly lodged; that it must therefore be dismissed as inadmissible, the lodging of an appeal being conditional upon the exercise of a pre-litigation procedure in accordance with the provisions of the Staff Regulations, this formality being substantial;

Whereas, moreover, it is important to note that even if the Joint Consultative Arbitration Committee has not yet been physically set up by the WAEMU Commission, it has already been established by Article 106 of Regulation No. 01/95/CM;

In these circumstances, Mr Agokla, who was aware of the existence of this body and that it had not been set up, should nevertheless have referred the matter to it through the President of the WAEMU Commission, as the officials whose cases he cites as case law had done, and then waited for the four (4) month time limit to expire before referring the matter to the Court of Appeal;

Considering that it should also be pointed out that in the aforementioned cases cited as settled case-law by the applicant and previously decided by the Cour de céans, there had never been any question of the admissibility of the appeals lodged by the officials but of the failure of the President of the Commission to comply with a substantial formality;

Considering finally that it is important to recall that it is the rule that the submissions of appeals by civil servants must have the same object as those set out in the prior administrative complaint and contain heads of dispute based on the same cause as that of the complaint ;

That this conformity is a matter of public policy insofar as it relates to the regularity of the administrative procedure which constitutes a substantial formality, the examination of this question of its own motion being justified in particular with regard to the very purpose of the administrative procedure which consists in allowing an amicable settlement of disputes arising between the civil servant or agent and the administration;

In the light of these observations, even if Mr Agokla had first referred the matter to the Joint Arbitration Advisory Committee, his appeal would still be declared inadmissible for lack of consistency between the said appeal and the administrative complaint;

Considering therefore that the claimant's action for compensation does not satisfy the preconditions set out above, it must be dismissed in its entirety;

Costs

Considering that the applicant has been unsuccessful in his pleas ;

Pursuant to Article 60 of the Rules of Procedure, any unsuccessful party shall be ordered to pay the costs;

That, however, since this is a dispute between the Commission and its agent, it is appropriate, in accordance with the provisions of Article 61 of the same regulation, 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 Kossi Mawuli Agokla's appeal inadmissible;
- Orders UEMOA to pay the costs.