Case n° 01/98

Laubhouet Serge

against

WAEMU Commission

(Français) "Fonctionnaire - Recours en responsabilité extra contractuelle - Recours en réparation et demande de réintégration" (French version only)

Summary of the judgment

1. *Community civil service law - Action for non-contractual liability and compensation for damage suffered by a Union official - Infringement of the provisions of Implementing Regulation No 5/96/COM/WAEMU of 1er February 1996 laying down the length of the probationary period.*

2. *The Advisory Committee on Recruitment and Promotion is not consulted for its opinion.*

3. *Application for reinstatement and payment of damages.*

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1. The action for extra-contractual liability cannot be considered as a subsidiary action to the action for annulment. The two actions have neither the same basis nor the same object.

2. By failing to bring its acts into force, the Commission commits irregularities that are tantamount to a defective functioning of the body and prejudicial to its constituent.

3. The Court of Justice cannot require the Commission to reinstate a member of its staff whose duties it has terminated, without violating the principle of the separation of judicial and administrative powers.

REPORT BY THE JUDGE-RAPPORTEUR

CLAIM FOR COMPENSATION
SERGE LAUBHOUET VS UEMOA COMMISSION

By application dated 23 April 1997, registered at the Court Registry on 24 April 1997, and served on the Commission by letter dated 26 June 1997 from the Court Registry, Mr DABIRE, Mr SORGHO and Mr TOE, associated lawyers at the Ouagadougou Bar, brought an application in the name and on behalf of their client Serge LAUBHOUET, agent de l'UEMOA, a requête en vue de voir engager la responsabilité de l'Union et condamner celle-ci à réparer le préjudice causé à Serge LAUBHOUET par la décision entachée d'irrégularité n° 97-047/SP/PC en date du 27 février 1997 mettant fin à ses fonctions.

I. THE FACTS

Mr Serge LAUBHOUET was recruited and appointed Internal Auditor, Senior Manager of the Union, classified at step 1 of grade B2 by Decision No 105/96/PCOM dated 24 October 1996. However, on expiry of the probationary period set at one year by the Staff Regulations governing him, he was notified of Decision No 97-047/SP/PC of 27 February 1997, specifying that his duties were to be terminated on the basis of his record of service. The informal request submitted by the applicant on 10 March 1997 was explicitly rejected by letter no. 97-101/SP/PC dated 7 April 1997 from the President of the Commission.

II. PROCEDURE AND CLAIMS OF THE PARTIES

A) THE APPLICANT BASES ITS ACTION ON THE FOLLOWING PROVISIONS :

- Article 27 of Additional Act No. 10/96 of 10 May 1996 of the Conference of Heads of State and Government on the Statute of the WAEMU Court of Justice, which gives the Court jurisdiction to hear disputes between the Union and its agents.

- Article 107 et seq. of Regulation No. 01/95/CM on the Staff Regulations of Officials of the WAEMU, relating to appeals by officials.

- Article 15, paragraph 5 of Regulation No. 01/96/CM on the Rules of Procedure of the Court of Justice of the WAEMU relating to non-contractual liability of the Union and compensation by the Union for damage caused by it either through material acts or through the normative acts of its organs.

- Article 2 of Implementing Regulation No 05/96/COM of 1er February 1996 laying down the length of the probationary period, which states that only after the official's performance has been assessed shall the President of the Commission take a decision confirming the official's appointment or terminating his service.

- Article 1 of Implementing Regulation No. 08/96/COM/WAEMU of 08 July 1996, which makes the decision of the President of the Commission on establishment subject to the prior consultative opinion of the Advisory Committee on Recruitment and Promotion. In fact, the applicant claims to have discharged his duties in an irreproachable manner during this probationary period and to have satisfactorily carried out the missions entrusted to him, that he has in particular sent 11 monthly administrative reports and 6 investigation reports which were not the subject of any negative observations that he has really requested other missions from the authorities who did not deign to respond to his requests.

What a surprise, then, when, during the probationary period, he was notified by letter no. 97-47/SP/PC of 27 February 1997 of the decision to terminate his employment, in breach of the law:

1. The provisions of Implementing Regulation No. 05/96/COM of 1er February 1996 setting the length of the probationary period, in that the official's performance was not assessed on the basis of the official's file together with the notes and assessments of his hierarchical superiors, in accordance with the above-mentioned Implementing Regulation.

2. The provisions of Implementing Regulation No. 08/96/COM/WAEMU of 8 July 1996, in that, pursuant to this text, the opinion of the Advisory Committee on Recruitment and Promotion provided for in the Staff Regulations of Officials of the Union was not sought.

Lastly, the applicant criticised the document for its content, which lacked any accurate assessment of the facts, in that the decision did not contain any serious grounds, because it was based on inaccurate facts, and that at no time was he the subject of "either a letter of observations, or reproaches, or sanctions from his superiors". In view of the foregoing, Serge Labhouet is seeking compensation for the damage caused by his dismissal, which he describes as unfair:

a) Mainly

- his reinstatement as a senior official in the Commission's services

- the payment of due instalments on the loan taken out with BICIA-B between 27 February 1997 and the date of its reinstatement.

- payment of 5,000,000 Frs in damages for material loss.

- payment of the symbolic franc for the non-material damage suffered.

b) In the alternative, and in the absence of a reinstatement order

An order that UEMOA pay it a total of 219,928,918 francs (two hundred and nineteen million nine hundred and twenty-eight thousand nine hundred and eighteen francs) for various losses.

In its statement of defence dated 24 July 1997, the Commission, through its agent, relied on the provisions of Article 8 of Additional Protocol No 1 relating to the supervisory bodies of the WAEMU and of Article 72 of the Rules of Procedure in concluding that the application of the applicant was inadmissible.

damage arising from the annulment of the act, is intended to follow the request for the granting of a particular advantage to the claimant.

In such cases, the court awards the victim any benefits to which he or she may be entitled.

Consequently, the Commission concludes that the action brought by Serge LAUBHOUET is inadmissible. Serge LAUBHOUET has acted directly to hold the Union liable for the damage suffered, without first obtaining the annulment of the decision against him.

In the alternative, the Commission alleges that the applicant's claims are ill-founded, arguing in particular that :

1. Contrary to the applicant's assertions, all EU officials at the end of their probationary period were appraised. Indeed, on 27 January 1997, the President of the Commission sent a letter to the Commissioners requesting that they be provided as soon as possible with the appraisals, marks and assessments of the officials placed under their authority. The letter, a copy of which is attached to file No. 97/007/PC/SP of 27 January 1997 addressed to Commissioner Younoussi TOURE, concerned the staff under the authority of the Commissioner in charge of financial policies.

2. With regard to the failure to obtain the opinion of the Advisory Committee on Recruitment and Advancement (ACRA), the Commission retorts that the opinion on the establishment of Union officials required by Article 26 of the Staff Regulations could not be obtained because it was impossible for the Commission to do so. In fact, the Commission maintains that on the date of expiry of the probationary period, all the civil servants and non-civil servants, including the members of the CCRA, were, without exception, at the end of their probationary period and therefore not yet established. Faced with this situation, which also existed at the stage of recruitment of the Union's agents, where the same opinion of the CCRA was required, the highest body, the Commission, was consulted for its opinion.

3. As to the plea raised by the applicant that the decision taken was unfounded, the Commission submits that it was clearly specified on the decision terminating the applicant's activities that it was on the basis of his record of service that his duties were terminated, moreover, the assessment made on the basis of the notes and assessments of the hierarchical superior contained in the assessment form dated 20 February 1997 of the person concerned, a copy of which is attached to the file, leads to the conclusion that the applicant is unfit to carry out the duties o f internal auditor or senior manager in the services of the Union.

In his reply dated 27 August 1997, the applicant insists that his action is not in any way an action for misuse of power but a contentious civil service action in accordance with the provisions of Regulation No 1/95/CM of 1er August 1995 on the Staff Regulations of Officials of the WAEMU. The claimant rejects the Commission's argument that it was impossible to consult the CCRA when it is common ground that this body was consulted at least four times. As for the assessment contained in the file produced by the Commission, the applicant doubts its credibility, especially when it is noted that the Commission is careful not to produce the assessment of the Commissioner in charge of the Financial Policies Department or an extract from the Commission's deliberations.

In its rejoinder dated 30 September 1997, the Commission emphasised the confusion between actions for annulment and actions for damages which persisted in the mind of the applicant, whom it invited to specify the legal regime under which he intended to bring his action.

The Commission insists on the justification given for rejecting the CCRA's opinion, this time invoking the theory of impossible formalities.

Lastly, the Commission stresses that the applicant, as an internal auditor, reports to the President of the Commission, who is consequently responsible for rating and assessing him, that the letter sent to the Commissioner responsible for Financial Policy was quoted and produced simply as an example, and that, moreover, the decision against the applicant is not a collegial decision but an individual decision by the President of the Commission in his capacity as appointing authority, and therefore as holder of the post, and is therefore intended to compensate for the lack of an opinion from the CCRA. That the Chairman felt he had to seek the opinion of the Members of the Commission, without giving this consultation the formal character of a compulsory administrative measure.

III. OBSERVATIONS AND CONCLUSIONS OF THE JUDGE-RAPPORTEUR

1. Admissibility of the action

The established case law of the Court of Justice of the European Communities (CJEC) - see CJEC ruling of 2 December 1971 ZUCKERFABRIC aff. 5/71.975 - whose texts have strongly inspired WAEMU Community law, has enshrined the principle of the autonomy of actions for damages in relation to actions for annulment. According to the aforementioned principle, there is no need to resort to the annulment procedure as a prerequisite to an action for compensation based on the illegality of an act of a Community body that has caused damage to the claimant victim. The two legal systems, i.e. the action for annulment and the action for damages, are considered to be completely independent of each other, as the action for damages is not subsidiary to the action for annulment. These actions have neither the same legal basis, nor the same purpose, nor the same legal grounds. The first allows the court to rule on the validity of the act that it may annul without drawing the legal consequences in terms of compensation for the damage caused, while the second allows the court to rule on the harmful consequences of the act in the event of any fault found in the legal activity of the author. The essential reason for this trend in the case law towards functional autonomy of these actions was also justified by the concern of the Community legislature to avoid offsetting the time limits between the two actions. Indeed, to accept that the annulment of an act by the Community judicature is a prerequisite for bringing an action for damages would mean that a person who is barred from bringing an action for annulment within 2 months of publication or notification, depending on the nature of the act (Article 8 of Additional Protocol No. 1) could not, under any circumstances, bring an action for compensation for the unlawfulness of that act after the main proceedings; whereas the limitation periods for actions for non-contractual liability are longer, being set at 3 years by Article 15/5 of the Rules of Procedure. In other words, failure to recognise the principle of autonomy would result in the limitation period for actions for damages being reduced to the two-month limitation period for actions for annulment. It is in the light of the above considerations that it is appropriate to adopt this principle of the independence of extra-contractual liability actions, which will enable the WAEMU Community judge, following the example of the European Community judge, to rule directly in matters of extra-contractual liability.

liability for the legal activities of the Community institutions, without, however, annulling the act or declaring it invalid; evidence of fault in the conduct of the author of the act and its causal relationship with the alleged damage being sufficient to allow the action for damages and to rule on the merits.

It should also be emphasised that the dispute(s) between the Union and its staff members are of a mixed nature, as can be seen from Articles 107 and 108 of the Staff Regulations. It may be either an action for annulment or an action for damages at the request of the staff member.

It is to this first line of case law that your rapporteur invites you, in asking you to declare admissible the applicant's action based, as he claims, on the liability of the Commission, whose disputed act is described as harmful, for not having been taken in full compliance with the law, even if the applicant, in a mixture of genres, also asks to be reinstated in his duties, considering his dismissal as unfair as if it were governed by employment law.

2. The pleas in law raised on the merits

a) In so far as the provisions of Article 2 of Implementing Regulation No 05/96/COM of 1er February 1996 were infringed for failure to assess the applicant's performance, and the provisions of Article 1 of Implementing Regulation No 8/96/COM of 8 July 1996 were infringed for failure to obtain the opinion of the Advisory Committee on Recruitment and Promotion, it should be pointed out that, although the Commission's defence argument that Serge LAUBHOUET's performance had been duly assessed, which appears indisputable because it is supported by the evidence produced, in particular the appraisal sheet of 20 February 1997 bearing the mark of 05/20 and concluding that this official was unfit for work, it should be noted, however, that as regards the failure to consult the CCRA, the theory of impossible formalities behind which the Commission is hiding seems difficult to accept, all the more so since the CCRA was set up by an act dated 8 July 1996 (i.e. well before the decision terminating the applicant's service dated 27 February 1997) and the members were appointed, regardless of their status under the Staff Regulations (which, moreover, was not laid down in the text setting up the structure); the Commission had

full latitude to appoint the members of the CCRA, in accordance with the required standards, from among the first permanent employees and to obtain their opinion before proceeding with the dismissal of non-permanent employees. In short, the relevance of the theory of impossible formalities is based on a real impossibility that must not be the result of any carelessness on the part of the administrative authority.

In truth, without dwelling too much on the pleas put forward by the parties, it should be noted that on the date of the facts of the case, that of the institution of the proceedings and even that of the preparation of the dispute by the exchange of the parties' pleadings :

- Act No. 1/96/CM on the Rules of Procedure of the WAEMU Court of Justice, adopted by the Council of Ministers on 5 July 1996;

- nor the Implementing Regulation No 05/96/COM/WAEMU of 1er February 1996 laying down the length of the probationary period (this Implementing Regulation, incidentally, contains provisions that do not conform, creating the option of extending the probationary period set at one year by the Basic Regulation);

- or the Implementing Regulation No 08/96/COM/UEMOA of 8 July 1996 laying down the composition and operating rules of the CCRA of UEMOA ;

have not been duly published by the Commission in the WAEMU Official Bulletin, whereas article 45 of the WAEMU Constitutive Treaty stipulates that "additional acts, regulations, directives and decisions shall be published in the Official Bulletin of the Union. They shall enter into force after their publication on the date they fix".

In other words, neither the Commission nor the applicant can rely on the provisions of the aforementioned regulations, which had not been published at the time the proceedings were instituted and were therefore not enforceable because they had not yet entered into force.

In any case, these Community standards have not been made available so that no one is supposed to ignore the law. This is the place to highlight the major shortcomings of Community legislation on the publication of acts, where the Official Bulletins are not dated to the day but to the month, and the date on which the Bulletins are deposited with the Commission, which is useful for calculating time limits, remains unknown because it is not regulated. The result, even when the text is published, is that in the absence of an application date fixed in the text, neither the starting point of the time limits nor their end point can be determined on the basis of the Community texts. This is the case of Regulation No. 1/96/CM/UEMOA on the Rules of Procedure of the Court of Justice of the WAEMU, inserted in the Official Bulletin of December 1996, which is supposed to be applicable on "the day of its publication". With regard to this Act, the date of publication which remains to be determined in December 1996 is the same as the date of entry into force, these two dates being in all cases prior to the period of publication of Official Bulletins no. 2, 3, 4 and 5 dated December 1996, March 1997 and June 1997 respectively, which Bulletins were sent to the Court of Justice by registered letter dated 3 December 1997.

There seems to be some confusion between the concepts of publication, entry into force and publication in the Bulletin Officiel. Publication consists of inserting the legal act in a specific official journal which, once published, informs the public and determines the entry into force and therefore the enforceability of the published act. However, in letter no. 87-97/YDY/eo of 22 October 1996 addressed to the President of the Commission, the Court drew attention to the questionable dating of the Union's Official Bulletins and the delays in their publication. Ultimately, the WAEMU would benefit from drawing inspiration from the relevant provisions of the OHADA Treaty relating to the enforcement of the organisation's uniform acts. In conclusion, it should be remembered that a text cannot come into force until it has been published, which implies the obligation to bring the content of the official bulletin to the attention of the public.

b) Compensation for loss

It should be noted, however, that although the applicant cannot rely, rightly or wrongly, on breaches of the texts he invokes, the fact remains that the abnormally long time taken by the Commission to publish the texts adopted and those adopted by the competent bodies of the Union (some remained in force for more than 10 months without being able to be brought into force), as well as the incomplete conditions of their publication, caused definite harm to the applicant who was unable to rely on the provisions protecting his status contained in those texts. Community citizens enjoy a right to the courts which enables them to make use of the prerogatives conferred on them by Community legislation and, if necessary, to have the conformity of the measures taken against them reviewed by the courts. The definite and manifest compromise of these rights, in the circumstances of the case as described above, constitutes unlawful conduct which has caused damage worthy of being made good by the award of damages.

The Judge-Rapporteur :

Mouhamadou Moctar MBACKE

OPINION OF THE ADVOCATE GENERAL

Laubhouet Serge was recruited by the WAEMU Commission on 19 February 1996 and appointed internal auditor on 24 October 1996.

He was subject to a probationary period of 12 months from 1 March 1996. On 24 February 1997, the President of the WAEMU Commission terminated his appointment by decision no. 97.047/SP/PC, which read as follows:

"At the end of this (probationary) period, in application of the aforementioned provisions of the WAEMU Staff Regulations and on the basis of your record of service, I hereby notify you that it is not possible for me to admit you as a WAEMU official.

Consequently, and in application of the provisions of article 29 paragraph 2 of the WAEMU Staff Regulations, your duties will be terminated on 28 February 1997. ....."

On 23 April 1997, Laubhouet challenged this decision before the WAEMU Court of Justice, arguing :

That the decision was defective in form, for having violated the provisions of Article 2 of the Implementing Regulation n°05/06/COM of 14 February 1996 which provides that the President of the Commission may only terminate the functions of an official after evaluation of the latter's performance, on the basis of the file of the person concerned together with the notes and assessments of the hierarchical superiors; that the appointing authority also disregarded the provisions of Article 1 of Implementing Regulation No. 08/96 of 8 July 1996 of the WAEMU Commission by failing to obtain the prior opinion of the Advisory Committee on Recruitment and Promotion before terminating the official's service.

That decision no. 97.047/SP/PC was laconic, light and lacking in legal foundation on the grounds that the Commission cannot, in the course of proceedings and for the purposes of the case, give reasons for its decision on the grounds of Laubhouet's professional shortcomings or misconduct, insofar as it has never brought any such complaints to the applicant's attention, who has not suffered any remarks or sanctions in the performance of his duties.
The applicant seeks a declaration that Decision No. 97.047 has been abused and :

* **Mainly** order :

  - his reinstatement at senior management level;

  - to pay him the instalments on the loans he took out with the bank from 27 February 1997 until the date of his reinstatement;

  - to pay him five million (5,000,000) CFA francs in damages (material loss) and 1 symbolic franc (non-material loss).

* **In the alternative**: Order the WAEMU Commission to pay it a total of 219,928,918 CFA francs, broken down as follows:

FOR PROPERTY DAMAGE :

Loss of earnings corresponding to 15 years' service at WAEMU, bearing in mind that Mr Laubhouet is 40 years old and the retirement age is 55.

Calculation basis: average annual salary

(1,113,165 X 12) x 15200	,369,700 FCFA
Repayment of the balance of the bank loan contracted with BICIA B6	,559,218 FCFA

FOR NON-MATERIAL DAMAGE :

Family pain and suffering CFAF 5	,000,000
Non-material damage due to a ban on access	FCFA
3,000,000to the Union's premises	
Damage to honour and reputation CFAF 5	,000,000

The Commission, through its agent, Alioune SENGHOR, submitted its statement of defence dated 24 July 1997.

It replied that Laubhouet's application should not be granted, either because it did not constitute an action for assessment of legality, in which case it should be declared inadmissible, or because it was unfounded on the merits, in which case it should be dismissed.

In its rejoinder of 27 August 1997, the applicant points out, and counters the Commission's argument, that the provisions of Article 112 of Commission Regulation No 01/95 of 1 August 1995 stipulating that the WAEMU Court of Justice has jurisdiction to hear any dispute between the Union and its officials in no way limit the type of claims which Union officials may bring before the Court, and that in the present case there is no question of an action for misuse of powers (assessment of legality).

ADMISSIBILITY OF THE ACTION :

The Advocate General will not dwell on this subject, as the information provided by the rapporteur on the legality of the action is both fruitful and relevant. He will also point out that Laubhouet was not able to submit his claims to the Joint Consultative Arbitration Committee beforehand because it had not yet been set up by the WAEMU Commission, but he nevertheless attempted an amicable settlement on 10 March 1997, which was rejected by the President of the Commission by letter no. 97.101/SP/PC of 7 April 1997.

PLEAS IN LAW RAISED ON THE MERITS :

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

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

In so doing, it manifestly evaded the provisions of Articles 1 and 2 of the above-mentioned Implementing Regulation No. 8, and its decision is irregular as vitiated in form and adversely affects the claimant.

Laubhouet was not accused of any professional misconduct during his probationary period; the reason given at the end of his probationary period, that his record of service was unsatisfactory, is inconsistent and lacking in substance.

Laubhouet has therefore suffered damage and the resulting loss must be compensated in accordance with Articles 16 of the Additional Protocol, 1 and 27 of the Statute of the Court, and 15(5)(1) and (3) of the Rules of Procedure of the Court.

The choice and assessment of the subsidiary claim are a matter for this court, which has no prerogative to order the reinstatement of a member of staff.

Compensation must cover dammum emergens and lucrum cessans. Non-material damage as well as material damage may give rise to compensation, but the claimant's bases for calculating his compensation are not justified. As for the repayment of the bank loan, there is no basis for this.

THE ADVOCATE GENERAL :

MALET DIAKITE

JUDGMENT OF THE COURT

29 May 1998

Between

Mr Laubhouet Serge

And

The WAEMU Commission

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

delivers this judgment :

Considering that by application dated 23 April 1997, registered at the Court Registry on 24 April 1997, Mr Serge LAUBHOUET, through his solicitors Mr DABIRE, Mr SORGHO and Mr TOE, duly registered at the Ouagadougou Bar, is asking the Court to hold WAEMU liable and consequently to order it to pay compensation for the damage suffered by him. DABIRE, SORGHO and TOE, members of the Ouagadougou Bar, asks the Court to hold the WAEMU liable and consequently to order it to pay compensation for the damage caused to him by the irregular decision of 23 April 1997 terminating his appointment on the basis of his record of service, a decision taken on expiry of the one-year probationary period laid down in the WAEMU Staff Regulations;

Considering that the applicant had been appointed internal auditor, classified at step 1, grade B2, by Decision No 105/96/P/COM of 24 October 1996, that, on expiry of the statutory probationary period, he was notified of the abovementioned decision terminating his duties;

Considering that the non-contentious request submitted on 10 March 1997 was the subject of letter no. 97-101/SP dated 7 April 1997, which did not grant the request;

Considering that Serge LAUBHOUET maintains i n support of his claims that the contested decision violated :

1) the provisions of Implementing Regulation No 05/96 of 1er February 1996 laying down the length of the probationary period, in that his performance was not assessed on the basis of his file together with the notes and assessments of his hierarchical superiors in accordance with the aforementioned Regulation;

2) that the Advisory Committee on Recruitment and Promotion was not consulted for its opinion, as provided for by Implementing Regulation No. 08/96/COM/WAEMU of 8 July 1996;

3) finally, the contested decision is based on an incorrect assessment of the facts and lacks serious grounds. In fact, he has always performed his duties correctly without reproach or sanctions from his hierarchical superiors;

Considering that, on the basis of the above pleas in law, the applicant requested :

To the principal :

- his reinstatement in his functions in the UEMOA services;

- the payment of due instalments on the loan taken out with BICIA-B from 27 February 1997 to the date of its reinstatement;.

- payment of 5,000,000 Frs in damages for material loss;

- payment of the symbolic franc for the non-material damage suffered.

In the alternative :

An order that UEMOA pay it a total of 219,928,918 francs (two hundred and nineteen million nine hundred and twenty-eight thousand nine hundred and eighteen francs) for various losses.

Whereas, through its agent, Mr Alioune SENGHOR, the Commission, in its statement of defence dated 24 July 1997, contends in the main proceedings that the action brought by Mr Serge LAUBHOUET is inadmissible, relying on the provisions of Article 8 of Additional Protocol No 1 relating to actions for annulment of acts of organs of the Union and of Article 72 of the Rules of Procedure, which make actions for extra-contractual liability based on a binding act subject to the intervention of a judicial decision annulling the act in question, which was not the case here, a judicial decision annulling the act in question, which was not the case here;

An action for annulment and an action for full jurisdiction cannot be confused in the same instance and are distinguished by the object of each action, one being directed against an act and seeking to annul it, the other relating to a subjective right and seeking compensation for damage with the causal links to be established between the wrongful material or legal conduct and the damage;

Considering, in the alternative, that the Commission submits that, although such an application should be declared admissible, Serge LAUBHOUET's claims are ill-founded in that, contrary to his assertions, all EU officials at the end of their probationary period have undergone an assessment, as attested by the assessment form dated 20 February 1997 attached to the file concerning the specific case of the applicant, whose hierarchical superior concluded that he was professionally unfit to perform the duties of internal auditor;

Whereas, with regard to the failure to obtain the opinion of the Advisory Committee on Recruitment and Advancement, the Commission objects that, as at the recruitment stage, it was faced with an impossible formality because all the staff members, including any members of the Committee, were in the process of being established;

ADMISSIBILITY OF THE APPEAL

It should be emphasised that the action for annulment under Article 8 of the Treaty establishing the European Community and the action for damages under Articles 15 and 16 of the Treaty constitute actions which are independent of each other, and that the action for non-contractual damages cannot in any event be regarded as a subsidiary action to the action for annulment. These actions have neither the same basis, nor the same object, nor the same means.

the action for annulment enables the court seised to rule on the validity of the contested act, which it may annul without, however, drawing the legal consequences as regards the harmful consequences resulting from the irregularity of the act; whereas the action for liability or compensation, as its name indicates, enables the compensation judge to draw the consequences of the imperfection of any material or legal act in order to assess the damage resulting therefrom with a view to reparation of t h e harm it has caused;

Whereas in litigation between the Community and its servants, the dispute is deemed to be of a mixed nature because it may relate either to an action for annulment of a Community act adversely affecting the Community or to an action for compensation for an act of the Community authority which has caused damage. Although examination of the application does not make it possible to state that LAUBHOUET intended to bring an action for annulment, the fact remains that his submissions highlight his definite claims for compensation;

Considering that the denial of the autonomy of the action for damages would result in the 3-year limitation period for an action for damages being reduced to the 2-month limitation period for an action for annulment. Where an individual has not acted within the time-limit of 2 months from publication or, as the case may be, notification of the act, laid down by Article 8 of the Additional Protocol for bringing an action for annulment of a Community act, he is unable to bring an action for liability despite the longer time-limit of 3 years granted to him by Article 15(5) of the Rules of Procedure;

Considering therefore that only the adoption of the principle of the autonomy of the action for non-contractual liability is likely to preserve the rights of litigants as granted by the Community texts while preserving the functional independence of this action in relation to the action for misuse of powers;

Considering that in order to do this, it must be considered that evidence of irregular conduct by the administrative authority in its legal acts must be sufficient to order it to pay compensation for the damage suffered, provided that there is a causal link between this conduct and the damage caused;

Considering therefore that Serge LAUBHOUET's action should be declared admissible for having complied with the form(s) and time limit(s) of the Community procedure, even if his claim for reinstatement proves inadmissible, if not ill-founded, on the basis of the action for damages on which he intended to base his action. That reinstatement presupposes or implies the annulment of the act of dismissal and infringes the principle of law that, out of respect for the separation of judicial and administrative powers, the Court of Justice cannot impose an obligation to act on a body of the Union;

PLEAS IN LAW RAISED ON THE MERITS

In that there has been an infringement of the provisions of Article 2 of Implementing Regulation No 05/96/COM of 1er February 1996 laying down the duration of the probationary period and prescribing the evaluation of the staff member's performance before deciding on his establishment, and an infringement of Article 1 of Implementing Regulation No 08/96/COM of 8 July 1996 in that the prior consultative opinion of the Advisory Committee on Recruitment and Promotion was not obtained.

Considering that it should be noted at the outset that Implementing Regulation No 05/96/COM/WAEMU of 1er February 1996 laying down the probationary period, and Implementing Regulation No 8/96/COM/WAEMU of 8 July 1996 laying down the composition and operating rules of the Advisory Committee on Recruitment and Promotion, have not been published by the Commission in the WAEMU Official Bulletin in accordance with the provisions of article 45 of the Constitutive Treaty, which states that "additional acts, regulations, directives and decisions shall be published in the Official Bulletin of the Union. They shall enter into force after their publication on the date they fix";

Considering that the aforementioned acts have not yet entered into force and are therefore unenforceable and without legal effect prior to such entry into force;

Considering that the principle of autonomy of the action for damages does not allow the legal act of eviction of LAUBHOUET to be challenged for the purpose of annulment, it remains that the claimant is entitled to rely on the irregularities affecting the said act, which may be of such a nature as to cause him reparable damage;

Considering that, to this end, it is remarkable that, by failing to bring into force Implementing Regulations No 05/96/COM/WAEMU of 1er February 1996 laying down the probationary period and No 08/96/COM/WAEMU of 8 July 1996 laying down the composition of the Advisory Committee on Recruitment and Promotion, the Commission's Administration has committed irregularities amounting to malfunctioning of the body, LAUBHOUET, all the more so because the Commission wrongly thought that its failure to request the opinion of the CCRA was based on the fact that the members it appointed had not yet been granted tenure, such a composition not being prohibited by any of the organisation's texts;

Considering further that the Court considers that, in the absence of a manifest error as to the accuracy of the facts, it cannot review the assessment made by an administrative authority of a body of the Union as to the state of service of a member of staff ;

COMPENSATION FOR DAMAGES

Considering that, as the deed of eviction of LAUBHOUET has not been annulled nor can it be annulled on the basis of the action for compensation thus submitted, the damage caused to the applicant cannot be based on the heads of claim as he has presented them, but rather on the damage arising exclusively from the administrative malfunctions referred to above;

Considering that although the claim for compensation is well-founded, its quantum is exaggerated; that the Court evaluates the loss suffered, all causes combined, at seven million francs (7,000,000 F);

FOR THESE REASONS

The Court, sitting in open court, having heard all the parties, in matters relating to the Community civil service;

In form :

Declares the action for compensation brought by Serge LAUBHOUET admissible;

In the background:

- Declares UEMOA liable for the damage suffered by Serge LAUBHOUET a s it results from the grounds of the present judgment;

- Awards him the sum of seven million (7,000,000) francs for all causes of loss;

- Orders UEMOA to pay it the said sum;

- Declares his request for reinstatement to be unfounded;

- That the costs shall be shared equally between the parties;