



**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Case No. 2010-112



Before: Judge Mark P. Painter , Presiding
Judge Inés Weinberg de Roca
Judge Luis María Simón

Judgment No.: 2011-UNAT-117

Date: 11 March 2011

Registrar: Weicheng Lin

Counsel for Appellant: Esther Shamash

Counsel for Respondent: John Stompor

JUDGE MARK P. PAINTER, Presiding.

Synopsis

1. There is no set way for the trial court to set damages for loss of chance of promotion. Each case must turn on its facts. And this Court will generally defer to the trial court's discretion.
2. Though the trial court "refused to speculate" on the exact percentage of chance, it did award three months' net base salary. We find no fault with the trial court's reasoning, and affirm the Judgment.

Facts and Procedure

3. David Musumba Lutta (Lutta) joined the United Nations in July 1989 as a Security Officer. He received a permanent appointment with the United Nations Office in Nairobi (UNON). In April 2007, he was assigned to the United Nations Operations in Côte d'Ivoire (UNOCI), as a Fire Marshall (G-6 level).
4. In November 2007, Lutta was involved in a traffic accident while driving an official United Nations vehicle in Abidjan, Côte d'Ivoire. Upon receiving information from the national police that Lutta had been under the influence of alcohol at the time of the accident, the Special Investigation Unit (SIU) of UNOCI performed an investigation. The investigation report of 19 November 2007 concluded that Lutta had been operating a United Nations vehicle while intoxicated.
5. By a memorandum dated 29 November 2007, the Chief Transportation Officer informed Lutta of the suspension of his UNOCI Driving Permit and Privileges. By memorandum in January 2008, Lutta was informed that his UNOCI Driving Permit and Privileges were permanently withdrawn.
6. By a memorandum in April 2008, the Director of the Department of Field Support (Director/DFS) referred the case to the Office of Human Resources Management (OHRM) for appropriate action. In April 2008, Lutta was charged with violating UNOCI driving rules, which prohibit driving under the influence of alcohol; failing to use reasonable care when

utilizing the property and assets of the Organization; and acting in a manner unbecoming of an international civil servant. Lutta responded to the charges.

7. In September 2008, the case was referred to the Joint Disciplinary Committee (JDC). In June 2009, the JDC submitted its report to the Secretary-General. The JDC concluded that there was not adequate evidence that Lutta had been driving under the influence of alcohol. Having so concluded, it could not find that Lutta had breached his duty to exercise reasonable care while driving a United Nations vehicle. The JDC further concluded that the general charge that Lutta acted in a manner unbecoming of an international civil servant was not substantiated. Based on these conclusions, the JDC recommended that all charges against Lutta be dropped.

8. Lutta returned to UNON in Nairobi in May 2009. In June 2009, he was informed that the Secretary-General had accepted the findings and conclusions of the JDC and decided to take no further action. Unfortunately, during the pendency of the disciplinary proceedings, Lutta was prohibited from applying for two posts that became open.

9. In September 2009, Lutta filed an application with the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) contending that charges should not have been brought against him.

10. The UNDT issued the Judgment on the Merits in March 2010 (Judgment No. UNDT/2010/052). The Dispute Tribunal found that the SIU's investigation of the traffic accident was conducted poorly, the Director/DFS wrongly recommended further action, and OHRM unfortunately went along with that recommendation.

11. In May 2010, the UNDT issued its Judgment on Compensation (Judgment No. UNDT/2010/097). The Dispute Tribunal concluded that Lutta was entitled to compensation for the loss of a chance of being considered for two posts because he had been barred from applying for them as a result of the ongoing disciplinary proceedings. But though it "refused to speculate" as to whether Lutta would have been selected for the posts, the Dispute Tribunal ordered the Secretary-General to pay Lutta three months' net base salary as compensation for the loss of a chance of being considered for the two posts.

12. The UNDT also concluded that, had Lutta's procedural rights been observed, he would not have incurred additional transportation costs for the period of 20 November 2007 to 2 May 2009, and, therefore, he was entitled to compensation for his travel costs for that period—USD 4,760. In addition, the Dispute Tribunal found that Lutta was entitled to compensation for moral damages of six months' net base salary.

13. On 12 July 2010, Lutta submitted his appeal in respect of the Judgment on Compensation. Lutta requests that the Appeals Tribunal amend the Judgment on Compensation to award him further compensation in relation to the loss of a chance of being considered for two posts and pre-judgment interest at eight per cent on the compensation for travel costs. The Secretary-General submitted his answer on 27 August 2010.

Considerations

14. While the UNDT "refused to speculate" on Lutta's exact chances for the promotions, it did award him three months salary for the "loss of chance". The Secretary-General does not appeal this decision—only Lutta challenges it, contending that the trial court was required to assess the percentage chances that he would have been selected. Not so. While this Court has approved that procedure as *one method* of assessing damages,¹ we respect the opinion of the trial judge as to how to determine damages in each particular case.²

15. While we note that the trial court awarded a higher post-interest rate than this Court has subsequently set,³ the Secretary-General did not appeal that issue, so we will not disturb that part of the award. Though Lutta may have been entitled to interest from the time that he incurred the travel expense, we do not disturb that part either—since Lutta received much more by the excess interest award, we do not vacate; judicial economy is served by affirming the Judgment rather than sending it back to the trial court for a miniscule tinker.

¹ See, e.g., *Hastings v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-109, para. 18.

² *Id.*

³ See *Warren v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-059.

Judgment

16. We affirm the UNDT Judgment.

Original and Authoritative Version: English

Dated this 11th day of March 2011 in New York, United States.

(Signed)

Judge Painter, Presiding

(Signed)

Judge Weinberg de Roca

(Signed)

Judge Simón

Entered in the Register on this 19th day of April 2011 in New York, United States.

(Signed)

Weicheng Lin, Registrar