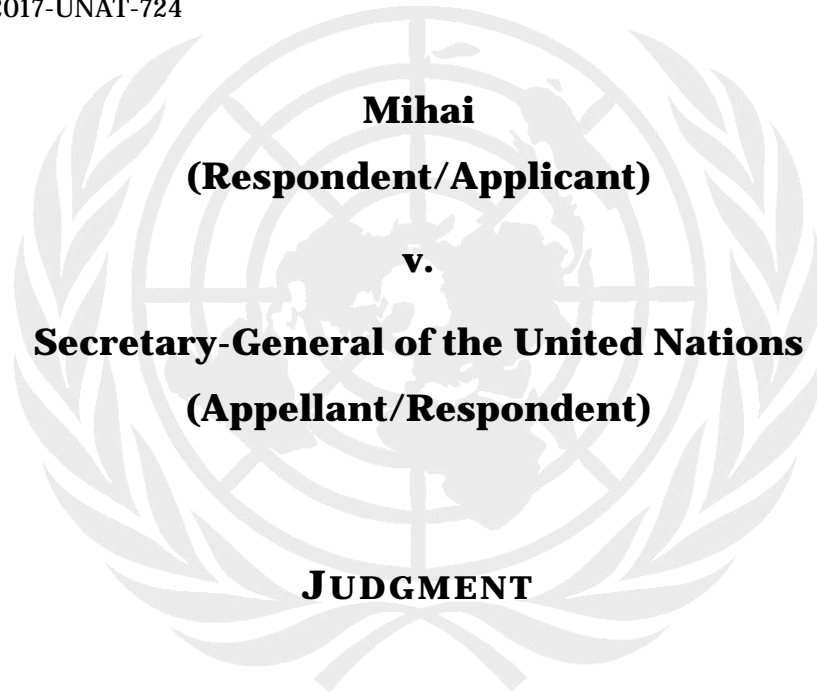




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2017-UNAT-724



**Mihai
(Respondent/Applicant)**

v.

**Secretary-General of the United Nations
(Appellant/Respondent)**

JUDGMENT

Before:	Judge Sabine Knierim, Presiding Judge Rosalyn Chapman Judge Martha Halfeld
Case No.:	2016-962
Date:	31 March 2017
Registrar:	Weicheng Lin

Counsel for Ms. Mihai:	Daniel Trup, OSLA
Counsel for Secretary-General:	Amy Wood

JUDGE SABINE KNIERIM, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2016/087, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 22 June 2016, in the case of *Mihai v. Secretary-General of the United Nations*. The Secretary-General filed the appeal on 22 August 2016, and Ms. Oana Angela Mihai filed her answer on 1 September 2016.

Facts and Procedure

2. The following facts are uncontested:¹

... At the time of the Application, [Ms. Mihai] held a fixed-term appointment at the P-4 level and served in the capacity of a Political Affairs Officer at the United Nations Stabilisation Mission in the Democratic Republic of the Congo (MONUSCO).

... [Ms. Mihai] previously served as an expert seconded by the Swiss Government to MONUSCO, following a Memorandum of Agreement (MOA) between MONUSCO and the Swiss Confederation, for the contribution of personnel to MONUSCO's Stabilisation Support Unit (SSU). The contract expired on 14 April 2014.

... In February 2014, [Ms. Mihai] was asked by MONUSCO whether she would be interested in a position as a Special Assistant to the Deputy Special Representative of the Secretary-General (DSRSG) for the Rule of Law.

... On 14 February 2014, [Ms. Mihai] wrote to Ms. Florence Kiwana, Administration Civil Affairs/MONUSCO:

As recommended by COS Snellen, I take the liberty to contact you regarding a recent exchange I had with DSRSG Wafy. I was recently approached by DSRSG Wafy inviting me to join his team as his Special Assistant. I have confirmed my availability to DSRSG Wafy and subsequently was advised to contact you in this perspective.

I am currently seconded by the Swiss Ministry of Foreign Affairs to MONUSCO's Stabilisation Support Unit; [SSU] this contract end (*sic*) 15 April 2014. However I was previously employed by MONUSCO as part of the SSU (from 11 October 2011 until 08 October 2013).

... On 7 March 2014, [Ms. Mihai] was informed by Ms. Kiwana that her recruitment was "already in motion".

... On 20 March 2014, [Ms. Mihai] received two further offers of employment.

¹ Impugned Judgment, paras. 1-22 (internal citations omitted).

... The first offer was for a position at the United Nations Multidimensional Integrated Stabilisation Mission in Mali (MINUSMA).

... The second offer was for a position with the World Bank.

... [Ms. Mihai] declined both positions in anticipation of the position with the DSRSG for the Rule of Law at MONUSCO.

... On 10 April 2014, [Ms. Mihai] received a three month offer to serve as Political Affairs Officer in MONUSCO. The offer of appointment was sent by Mr. Minhazur Rahman, Manager for On-Boarding and Separation Service Line, Regional Centre, Entebbe.

... The offer of appointment was subject to [Ms. Mihai] satisfying visa requirements and being medically cleared to serve. The letter went on to state that the appointment would become effective when [Ms. Mihai] reported for duty and received the formal Letter of Appointment.

... On 14 April 2014, [Ms. Mihai] unconditionally accepted the Offer of Appointment and sent a signed copy back to the Recruitment Service Centre.

... On 14 April 2014, [Ms. Mihai] was certified medically fit by Dr. Swapan Kumar, Medical Officer, MONUSCO; and documentation to that effect was submitted to the Recruitment Service Centre in Entebbe on 15 April 2014.

... On 24 April 2014, [she] confirmed by e-mail to Ms. Marie Michelle Aurélus, On-Boarding and Separation Service Line, Regional Centre, Entebbe that she had submitted her expired Laissez-Passer to New York for renewal. In reply, Ms. Aurélus requested that [Ms. Mihai] inform her upon receipt of her new Laissez-Passer so that official travel to MONUSCO could be arranged.

... On 5 May 2014, [Ms. Mihai] sent Ms. Aur[é]lus the requested copies of the Security in the Field Certificates.

... On 14 May 2014, she sent by e-mail a copy of her previous contract as a [S]econded Expert to Ms. Aurélus.

... On 6 June 2014, [Ms. Mihai] received notification that she had been shortlisted for another position with MINUSMA. As [Ms. Mihai] had contractually consented to her engagement with MONUSCO, she withdrew her candidacy with MINUSMA.

... [Ms. Mihai] made repeated requests for updates to MONUSCO on her recruitment status on 19 May 2014, 10 June 2014, 23 June 2014 and 10 July 2014 by e-mail. No reply was forthcoming.

... In late July 2014, [Ms. Mihai] received a telephone call from Ms. Ilene Cohen, Chief of Staff to the DSRSG of MONUSCO. Ms. Cohen informed [Ms. Mihai] that the Offer of Appointment was void on the basis that she had previously worked as a Seconded Expert with MONUSCO. As a result, Ms. Cohen stated, [Ms. Mihai] was not eligible for

employment with MONUSCO for six months after completion of her contract with the Swiss Government.

... On 14 August 2014, [Ms. Mihai] submitted a request for management evaluation.

... The Management Evaluation Unit did not respond to the request.

... On 9 October 2014, [Ms. Mihai] filed [her] Application and seeks compensation for moral damages in the amount of three months net based salary at the P-4 step 5 level together with 24 months net based salary at the same level for loss of opportunity.

3. On 22 June 2016, the UNDT issued its Judgment. The UNDT found that Ms. Mihai's application was receivable on the ground that a valid offer of employment had been made and that, therefore, Ms. Mihai had standing. The UNDT further held that:²

... There was a valid offer of employment which was subsequently withdrawn, so [Ms. Mihai] is entitled to monetary compensation. It should be noted that [Ms. Mihai] turned down two offers of employment at the World Bank and MINUSMA.

The UNDT awarded compensation in the amount of "18 months' net base salary at the P-4, step 4 level, as *per* the Statement of Emoluments that accompanied the Offer of Appointment, in lieu of rescission of the impugned decision, and for loss of opportunity".³

Submissions

The Secretary-General's Appeal

4. The UNDT erred in law and fact in awarding speculative and excessive damage when it failed to follow a principled approach, explain the methodology employed and demonstrate how the amount of compensation was proportionate to the harm suffered. When awarding Ms. Mihai 18 months' net base salary as compensation in lieu of rescission of the contested decision and for loss of opportunity, the UNDT did not provide any explanation for the basis or method for its computation of the quantum of compensation ordered other than simply noting that Ms. Mihai had turned down two offers of employment. It is impossible, thus, to determine what percentage of the total compensation ordered by the UNDT was intended to serve as compensation in lieu of rescission and what percentage was intended to serve as compensation for the perceived loss of opportunity. As such, the UNDT committed a reversible error of law.

² *Ibid.*, para. 64.

³ *Ibid.*, para. 67.

5. An award of compensation in lieu of rescission that is not commensurate with the duration of the underlying appointment is contrary to the established jurisprudence. Had the contested decision been rescinded, Ms. Mihai could have expected to receive three months' net base salary in accordance with the terms of the Offer of Appointment.

6. The award for loss of opportunity is not supported by evidence. Ms. Mihai has not demonstrated, and the UNDT has failed to show, that she suffered economic harm in the form of "loss of opportunity" as a direct consequence of the contested decision. The offers of employment referenced by the UNDT cannot form the basis for "lost opportunity" as they were both received by Ms. Mihai—and declined at her own risk—before she received the Offer of Appointment from MONUSCO, upon which she bases her claim of detrimental reliance.

7. Insofar as part of the UNDT's award of compensation for loss of opportunity was intended by the UNDT to compensate Ms. Mihai for a "lost" chance of employment with MONUSCO, the UNDT erred in law by making a duplicative award of compensation. With the UNDT's award of compensation in lieu of rescission, Ms. Mihai was already compensated as though she had been appointed to the post with MONUSCO; thus, there can be no "loss of opportunity and chance" for appointment to that same post.

8. The Secretary-General requests that the Appeals Tribunal reduce the award of compensation to an amount not exceeding three months' net base salary as compensation in lieu of rescission of the contested decision.

Ms. Mihai's Answer

9. The UNDT's award of compensation was commensurate with the totality of the facts and circumstances of Ms. Mihai's appointment. The Secretary-General has failed to demonstrate an error in law or fact by the UNDT; nor has he shown that the UNDT's exercise of discretion was manifestly unreasonable.

10. The Secretary-General is effectively seeking to limit the award of compensation to a three month contract at the exclusion of the clear intentions of the parties. Although Ms. Mihai was offered a three month contract, it was abundantly clear that this was a short-term measure and it was always the intention of the parties that Ms. Mihai would be with MONUSCO for longer than just three months. The Secretary-General narrows the body of actual facts supporting the UNDT's compensation award. While the withdrawn MONUSCO position is an operative fact

supporting compensation, it is not the only operative fact. The facts support the reasonable conclusion that the parties intended a longer term employer/employee relationship.

11. Contrary to the Secretary-General's assertion, the UNDT did not err in awarding compensation for loss of opportunity. Applicable jurisprudence recognizes that "loss of chance" is compensable, and it is within the Dispute Tribunal's authority to assess, for example, a candidate's chances for selection and her lost chance to considerably improve her status within the Organization. Here, Ms. Mihai turned down two job offers, relying upon the Administration's clear intention communicated to her that she would be recruited as evidenced by the MONUSCO offer. Moreover, the withdrawal of the MONUSCO offer deprived Ms. Mihai of the opportunity to position herself for a contract extension or promotion with MONUSCO and, by extension, the Organization. The UNDT's factual finding relating to the loss of alternate job opportunities is evidence of clear and compensable harm; and, the UNDT's award was entirely reasonable given the evidence presented and the specificities of Ms. Mihai's case.

12. The UNDT's award was within its authority, based on the available evidence before it, and was in no way manifestly unreasonable. The Secretary-General has presented no evidence that the UNDT's discretion was exercised in a manifestly unreasonable manner. Pursuant to the deference typically afforded the UNDT, Ms. Mihai's award should not be disturbed.

13. Ms. Mihai requests that the Appeals Tribunal dismiss the appeal in its entirety.

Considerations

Preliminary matter: Rescission of the impugned administrative decision

14. As a preliminary matter we note that, before awarding any in-lieu compensation, the UNDT has to order rescission of the impugned administrative decision pursuant to Article 10(5)(a) of the Dispute Tribunal Statute (UNDT Statute). In the present case, the UNDT did not expressly rescind the impugned decision to withdraw the 10 April 2014 offer of appointment; however, the award of compensation "in lieu of rescission"⁴ can be read as an implied order of rescission under Article 10(5)(a) of the UNDT Statute. For the future, we advise that the UNDT expressly order rescission in cases where the

⁴ *Ibid.*, para. 67.

impugned administrative decision is regarded to be unlawful before ordering any in-lieu compensation.

Scope of judicial review on appeal

15. This Tribunal has consistently held that “compensation must be set by the UNDT following a principled approach and on a case by case basis” and that the Appeals Tribunal will not interfere lightly as “[t]he Dispute Tribunal is in the best position to decide on the level of compensation given its appreciation of the case”.⁵ However, our jurisprudence also requires that the UNDT give a thorough and convincing reasoning as to the amount of compensation awarded. If the UNDT fails to present such reasoning, it is up to the Appeals Tribunal to step in and decide whether to remand the case to the UNDT, or set an amount of compensation and modify the UNDT Judgment under Articles 2(3), 2(5) and 9(1) of the Appeals Tribunal Statute (Statute).

16. In the present case, the UNDT gave no reasoning for the calculation of the compensation awarded to Ms. Mihai; nor did it specify what amount corresponded to in-lieu compensation and what amount was compensation for loss of opportunity. As we can set an amount of compensation based on the record before us, there is no need to remand the case to the UNDT pursuant to Article 2(5) of the Statute. Rather, the Appeals Tribunal has authority under Articles 2(3) and 9(1) of the Statute to set the appropriate amount of compensation and, if necessary, modify the UNDT Judgment in this regard.

17. The UNDT awarded 18 months’ net base salary at the P-4, step 4 level, “in lieu of rescission of the impugned decision, and for loss of opportunity”. It thus implicitly dismissed Ms. Mihai’s application for compensation for moral damages. We note that Ms. Mihai has not appealed the UNDT Judgment, and the Secretary-General submits that the UNDT’s award of compensation be set at no more than three months’ net base salary.

18. Article 9(1) of the Statute provides:

The Appeals Tribunal may only order one or both of the following:

⁵ *Krioutchkov v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-691, para. 28, citing *Rantisi v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-528, para. 71, and *Solanki v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-044, para. 20.

(a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Appeals Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;

(b) Compensation for harm, supported by evidence, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Appeals Tribunal may, however, in exceptional cases order the payment of a higher compensation for harm, supported by evidence, and shall provide the reasons for that decision.

In-lieu compensation under Article 9(1)(a) of the Statute

19. The Appeals Tribunal's discretion is constrained by the mandatory requirement in Article 9(1)(a) of the Statute to set an amount of compensation as an alternative to an order rescinding a decision concerning appointment, promotion or termination. In case of such an order, the Tribunal must set an amount of in-lieu compensation that the Secretary-General may elect to pay instead.⁶ Compensation in lieu of rescission under Article 9(1)(a) of the Statute shall be an economic equivalent for the loss of a favourable administrative decision;⁷ accordingly, the Tribunal may award compensation for actual pecuniary or economic loss, including loss of earnings.⁸

20. In Ms. Mihai's case, we award three months' net base salary at the P-4, step 4 level, as compensation in lieu of rescission of the impugned decision to withdraw the 10 April 2014 offer of appointment. As Ms. Mihai received and accepted a MONUSCO temporary appointment for three months, to award more than three months of in-lieu compensation would be considered excessive under our case law.⁹ Furthermore, Ms. Mihai's chance that the appointment would have been renewed may not be taken into account for the in-lieu compensation as this would be a violation of Staff Regulation 4.5(b) and Staff Rule 4.12(c), both of which provide that "a temporary appointment does not carry any expectancy, legal or otherwise, of renewal".

⁶ *Verschuur v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-149, para. 48.

⁷ *Warren v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-059, para. 10.

⁸ *Cohen v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-131, paras. 18 and 22.

⁹ *Maiga v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-638, paras. 29-30.

Compensation for harm under Article 9(1)(b) of the Statute

21. Article 9(1)(b) of the Statute does not only allow compensation for non-pecuniary damage (i.e., procedural violations, stress, and moral injury) but also for pecuniary or economic loss other than the “value” of the rescinded administrative decision.¹⁰ Our case law requires that the harm be directly caused by the administrative decision in question.¹¹ Pursuant to Article 9(1)(b), compensation may be awarded for harm suffered that is supported by evidence. Finally, there may not be duplicative compensation.¹²

22. Applying these principles, we deem it necessary and also sufficient to award three months’ compensation. This is compensation for the pecuniary harm suffered by Ms. Mihai, as noted below, during her period of unemployment, but not for loss of opportunity in connection with the other job offers.

23. Ms. Mihai cannot claim compensation for the loss of opportunity for the one year appointment offered by MINUSMA on 12 March 2014 or the 120 days’ job offered by the World Bank on 18 March 2014, as she rejected them *before* she received and accepted the 10 April 2014 unconditional offer of appointment by MONUSCO. There is no detrimental reliance resulting in compensable harm under Article 9(1)(b) of the Statute as there is no direct link between the impugned administrative decision and the harm for which compensation is requested.

24. Similarly, Ms. Mihai cannot claim compensation for the loss of opportunity of the job interview on 6 June 2014 with MINUSMA. She did not present any evidence, neither of the conditions of the employment in question nor of her chances of being selected. Consequently, this Tribunal has no basis to award compensation in this regard.

25. However, we also award compensation for Ms. Mihai’s three months period of unemployment from April until July 2014. This unemployment does constitute pecuniary harm under Article 9(1)(b) of the Statute. The documentary evidence allows us to link the period of her unemployment directly to the impugned administrative decision: Her communication with Ms. Aurélus between April and July 2014 shows that Ms. Mihai trusted in the 10 April 2014

¹⁰ *Faraj v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-587, para. 26.

¹¹ *Diatta v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-640; *Israbhakdi v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-277.

¹² *Kasmani v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-305, para. 37.

unconditional offer of appointment and did not look for or accept other job opportunities. If the Administration had told Ms. Mihai that she was not eligible for the MONUSCO appointment without the Administration securing the necessary waiver, Ms. Mihai would have had the chance to decide whether she wanted to rely on the MONUSCO offer or look for other employment opportunities. In withholding this information from her, the Administration acted in a non-transparent manner and breached its duty to act in good faith. As we do not have any evidence for further unemployment after July 2014, and as Ms. Mihai is compensated for the July 2014 withdrawal of the MONUSCO offer in lieu of its rescission (see above), it is not possible for us to award more compensation to Ms. Mihai.

Judgment

26. The Secretary-General's appeal is partly granted. Judgment No. UNDT/2016/087 is hereby modified and Ms. Mihai is awarded compensation in a total amount of six months' net base salary at the P-4, step 4 level.

Original and Authoritative Version: English

Dated this 31st day of March 2017 in Nairobi, Kenya.

(Signed)

Judge Knierim, Presiding

(Signed)

Judge Chapman

(Signed)

Judge Halfeld

Entered in the Register on this 26th day of May 2017 in New York, United States.

(Signed)

Weicheng Lin, Registrar