

JUDGE DIMITRIOS RAIKOS , PRESIDING .

1. Boubacar Dieng (Mr. Dieng) 8 0 Tw (())Tj -0.01 (o78 .001 Tc -0.001 Tw 0

7. On 10 March 2018 E0 Ma3 0 Td [0 arA MAr.6(r)-7M0 Mrr.6(9831T1-070. Tc(a)10 Td [w(.6(r)-as(.6(883

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38. The UNDT did not find the reassignment unlawful on the basis of what was in the best interest of the staff member nor did the UNDT find reassignment due to performance concerns unlawful or that it was required to document performance shortcomings before reassignment – what the UNDT held was the process and the context within which the reassignment occurred was unlawful.

39. Further, Mr. Dieng avers that the UNDT correctly found that the reassignment was a veiled disciplinary measure geared toward evading investigation. The UNDT did not suggest that an investigation was mandatory before reassignment or that the absence of the investigation was itself unlawful. What the UNDT said was

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The Cross -Appeal on the Lawfulness of the Reassignment Decision

44. On cross-appeal, the Secretary-General appears to be restating the claims which he made before the UNDT. However, he has failed to demonstrate that the UNDT committed any error of fact or law in arriving at its decision.

45. We recall the Appeals Tribunal's jurisprudence confirming the Administration's discretion to appoint, transfer and promote staff. The Appeals Tribunal has held that as a matter of general principle, in exercising its judicial review, the Dispute Tribunal will not lightly interfere with the exercise of managerial discretion in matters such as staff transfers⁸

46. Nevertheless, an administrative decision not to appoint, promote or transfer can be challenged on the grounds that the Administration has not acted fairly, justly or transparently. The staff member has the burden of proving such factors played a role in the administrative decision.⁹

47. When judging the validity of the Administration's exercise of discretion in administrative matters, as in the case of the abovementioned decision, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The first instance Judge can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Administration amongst the various courses of action open to it. Nor is it the role of the Dispute Tribunal to substitute its own decision for that of the Administration.¹⁰ As we stated in *Sanwidi*, when the Dispute Tribunal (and the Appeals Tribunal) conducts a judicial review, it does not engage in a merit-based review:¹¹

⁸ *Yolla Kamel Kanbar v. Secretary-General of the United Nations*, Judgment No. 2021-UNAT-1082, para. 28 citing *Orabi v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2018-UNAT-884, para.19; *Beidas v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2016-UNAT-685, para 18; *Abdullah v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2014-UNAT-482, para. 59.

⁹ *Orabi Judgment*, op. cit., para. 20; *Kule Kongba v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-849, para. 26; *Pirnea v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-311, para. 32.

¹⁰ *Orabi Judgment*, op. cit., para. 21; *Kule Kongba Judgment*, op. cit., para. 27.

¹¹ *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, para. 42.

nothing was done to bring them to his attention and to meaningfully remedy the situation in accordance with section 10.1 of ST/AI/2010/5.

34. The mere reassignment of [Mr. Dieng] to another office under circumstances of undisclosed, un-investigated and unresolved egregious and damning allegations such as these can only be ruled to have been arbitrary, and a violation of [his] due process rights since he was denied an opportunity to rebut them and clear his record.

35. The Respondent's argument, based on the general authority of Heads of mission to reassign staff members within the mission is unsustainable. The reassignment in this case was done in the context of a number of contentious issues including a failed investigation. It was therefore wrong for the Respondent to act in a business-as-usual manner on the basis of general authority to reassign [Mr. Dieng] to another office.

51. Based on these factual findings, the UNDT came to the conclusion that:¹⁴

[Mr. Dieng's] reassignment was done in violation of the applicable law (ST/AI/2010/5), and it was therefore arbitrary. It was made in bad faith and in violation of the Applicant's due process rights since the complaints which formed the basis for the decisions were not disclosed in a timely manner and by which the right to a fair process. The complaints were never investigated and so he had no opportunity to rebut them, yet they remain on the record. On the whole, there was unlawful exercise of discretion".

52. In the course of his cross-appeal, the Secretary-General submits that the UNDT erred in law in finding that Mr. Dieng's reassignment was in violation of the applicable law and a violation of his due process rights. He contends that the UNDT erred when it found that "the mere reassignment of [Mr. Dieng] to another office under circumstances of undisclosed, un

53. We do not find merit in these submissions. As the UNDT found, and as evinced in the established evidence on file, the primary reason for Mr. Dieng's reassignment was to address concerns about his performance. The Administration concedes this fact but avers that, even

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thereof where the issue relates to appointment, promotion or termination) ordered pursuant to sub-paragraph (5)(a). Yet again, compensation under Arti

as [Mr. Dieng] was reassigned within the Mission at the same P5 grade and level, he suffered no economic harm as a result of the contested decision’.

70. We find no reasons to differ from that conclusion, since the findings of fact made by the UNDT can only be disturbed under Article 2(1)(e) of the

III. The Quantum of the Moral Damages Award

Compensation for Stress and Anxiety

74. Per our jurisprudence, an entitlement to moral damages may arise where there is evidence produced to the Tribunal by way of a medical or psychological report of harm, stress or anxiety caused to the employee, which can be directly linked, or reasonably attributed, to a breach of his or her substantive or procedural rights and where the Tribunal is satisfied that the stress, harm or anxiety is such as to merit a compensatory award.²⁵

75. This Tribunal has consistently held that “compensation must be set by the UNDT

78. Mr. Dieng requests that moral damages be increased to six months' net base salary. He contends that the UNDT erred on a question of law when it failed to properly consider and apply relevant Appeals Tribunal jurisprudence with regard to the amount to award in compensation. In this respect, he claims that the UNDT did not consider *simie 1 (h)-005 Tc dn tn t,le3.1 h1 (5*

Compensation for Reputational Harm

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89. In terms of Mr. Dieng's first claim, we hold that such a remedy is not within the statutory remit of either the UNDT or this Tribunal. However, in light of our findings above, and to give solace to Mr. Dieng we hereby direct that a copy of Td [(,)-4.28 (h)-4 (t312041(e)-4s8 (Di)0J8 (4)

