Before: Judge Goolam Meeran
Registry: Amman
Registrar: Laurie McNabb

ARYA

v.

COMMISSIONER GENERAL OF THE UNITED NATIONS RELIEF AND WORKS AGENCY FOR PALESTINE REFUGEES

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Lance Bartholomeusz (DLA)
Introduction

1. Mukesh Arya (the “Applicant”), a former staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East, also known as UNRWA (the “Respondent”), appealed the decisions of the Agency to:

   (i) Reclassify the post he occupied – Director, Department of Internal Oversight Services (“D/DIOS”), D-1 – to create a new post with expanded functions – D/DIOS, D-2;

   (ii) Not select him for the new post of D/DIOS, D-2; and

   (iii) Terminate his appointment in the interests of the Agency.


3. Pursuant to General Assembly Resolution 63/253 of 24 December 2008, the JAB was abolished as of 1 July 2009. With effect from 1 June 2010, as set out in International Staff Regulation 11.1, the Agency established the UNRWA Dispute Tribunal (“the Tribunal”) and all appeals pending with the JAB on the date of its abolition, including this application, were transferred to the Tribunal. The Tribunal did not become fully operational until 1 June 2011, when a judge was first appointed. The administrative difficulties and delay in establishing the Tribunal, the need to manage the huge backlog of cases in an orderly manner, and the need to do justice to the parties are factors to be taken into account in deciding whether it would be in the interests of justice to grant the Respondent an extension of time to file a reply and to take part in the proceedings in this case.

Facts

5. On 3 February 2003, the Applicant was appointed Director, Audit and Inspection Department, D-1 at UNRWA Headquarters, Amman on a one-year fixed-term contract. The Applicant’s appointment was extended a number of times.

6. On 20 January 2008, his fixed-term appointment was extended through to 2 February 2011 with the new title of D/DIOS, D-1.

7. By memorandum dated 30 September 2008 to Ms. Angela Kane, the Under-Secretary-General for Management (“USG/M”), Ms. Karen Koning AbuZayd, the former Commissioner-General of UNRWA, sought support for the upgrade of a number of Director posts within the Agency from grade D-1 to grade D-2. The D/DIOS post was among those identified by Ms. Koning AbuZayd as requiring a review and possible upgrade, with the Commissioner-General noting:

The post of Director of Internal Oversight Services, currently at the D1 level, is responsible for internal audit, inspection and investigation, all of which are areas of increasing activity and importance. UNRWA is currently reviewing this function in consultation with its Advisory Committee on Internal Oversight (ACIO), with a view to strengthening its capacity and strategic impact. This review will result in enlarged responsibilities which will warrant a D2 grading for the post.

8. The Agency’s Advisory Committee on Internal Oversight (“ACIO”) held its 25th meeting on 17 November 2008. A discussion paper prepared by the Executive Office with the subject “Organization Design of the oversight function” was introduced at the meeting. The paper listed eight “oversight-related” functions that existed or needed to be established in the Agency and listed a series of questions about how to organize the Agency’s oversight functions bearing in mind its limited resources. The “notes of discussion” from the meeting relating to this agenda item concluded as follows:

The ACIO noted that the creation of an umbrella Department to cover all of internal audit, inspection, investigation, programme evaluation, ethics and administratively absorb the ombudsman and formal justice functions will require a review of the grading,
competencies and skills of the existing Department of Internal Oversight. In relation to the head of the Department, the ACIO expressed the strong view that the grade must be commensurate with the increased duties and profile of the position. The ACIO expressed support for the suggestion that the Director post should be a D-2.

The ACIO provided a recommendation to the Commissioner-General as follows:

The ACIO recommended that the Agency explores, in the context of Organizational Development, the redesign of the oversight functions in accordance with the principles and advice described above. The ACIO recommended that, in doing so, the Agency examine the skills, grades and other characteristics of the Department to ensure they are commensurate with its expanded profile and responsibilities…

By letter to the USG/M dated 13 February 2009, Ms. Koning AbuZayd reiterated UNRWA’s continuing need to reclassify a number of Director posts within the Agency, including the post of D/DIOS.

9. An International Staffing Review Report was issued in March 2009 following discussions held in November 2008 and January 2009 to review the Agency’s utilization of international posts. The Report states that the sessions were attended by the Deputy Commissioner-General, Director of the Executive Office, Director of Human Resources and senior staff from the Executive Office and the Department of Human Resources. It set out a series of follow-up actions which included the reclassification of the D/DIOS post from D-1 to D-2.

10. On 22 March 2009, the Agency issued Vacancy Announcement No. 09-HQ-AM-16 for the post of Director, Internal Oversight Services, D-2. It listed the following requirements:

**PROFESSIONAL KNOWLEDGE AND EXPERIENCE**
(a) An advanced university degree from a recognized university in public or business administration, auditing, finance or other related area; (b) An advanced professional certification obtained through courses of professional study under the auspices of internationally recognized bodies is an asset; (c) At least 15 years of combined national and international professional experience in an oversight function with at least five years of experience at senior supervisory level; (d) Experience with risk management in large organizations is an asset […]
COMPETENCIES
(a) Ability to develop and implement a clear strategic vision for the oversight function in the context of evolving institutional reform and to communicate that vision with authority […]

DESIRABLE QUALIFICATIONS
(a) Working knowledge of written and spoken Arabic; (b) Knowledge of UN financial rules, regulations and procedures, as well as knowledge of audit, investigation and evaluation guidelines.

11. On 24 March 2009, Ms. Cornelia Moussa, the Director of Human Resources, approved the revised international post description for the role.

12. By e-mail dated 12 April 2009, the Applicant wrote to Ms. Koning AbuZayd seeking a number of clarifications about the effect that the recruitment for the upgraded post would have on his employment. He stated that it came as “a shock” when he was notified that the vacancy would be advertised externally. While he expressed confidence that his qualifications, experience and competencies matched the job description for the upgraded post he acknowledged that there was a possibility that the selection panel might recommend another candidate for the post. The Applicant specifically questioned what would happen to him in the event that he was not selected and noted that:

When you renewed my contract for three years effective 3 Feb 2008, I made certain decisions, personal and professional, in the comfort that an UN agency as a career organization will always honour its obligations. These decisions included my retirement from the Indian Civil Service.

The Applicant noted the introduction of a five-year limit on post occupancy in the Agency’s International staff policy effective 1 April 2009 and sought clarification about the application of the Agency’s managed reassignment policy to his situation. He also requested that Ms. Koning AbuZayd complete his Performance Evaluation Reports (“PER”) for the years 2006 and 2007 to aid him in his search for alternative employment should he not be selected for the upgraded post.

13. The Applicant met Ms. Koning AbuZayd on 14 April 2009 to discuss his concerns.
14. By e-mail dated 26 April 2009, the Applicant wrote to the Ms. Koning AbuZayd summarizing the clarifications he had received and the major points of discussion at the meeting of 14 April 2009. According to the Applicant’s summary he was advised that all posts including D/DIOS are subject to rotation and that reassignment would be pursued if he was not selected for the upgraded post. If an appropriate post was not available he would be given sufficient time to seek opportunities elsewhere. According to the e-mail, Ms. Koning AbuZayd also queried why the Applicant had assumed the vacancy announcement would be internal rather than external. The Applicant provided a number of examples of previous practice within the Agency and Ms. Koning AbuZayd stated that the Agency wanted to change this policy.

15. The Agency received 57 applications, four of which were from internal applicants, including the Applicant. Six external candidates who satisfied the post requirements were short-listed for an initial telephone interview. These preliminary interviews were conducted on 14 and 27 May 2009. Following the telephone interviews, three external candidates were found to warrant further assessment in a personal interview. Personal interviews of the Applicant and the three external candidates were conducted on 15 and 16 June 2009.

16. The Interview Panel consisted of three senior staff of the Agency – Mr. Filippo Grandi, who was at that time the Deputy Commissioner-General (now Commissioner-General); Mr. Michael Kingsley-Nyinah, Director of the Executive Office; and Ms. Cornelia Moussa, Director of Human Resources – and three external members of the ACIO – Ms. Carman La-Pointe, Director of the Office of Audit and Oversight, International Fund for Agricultural Development; Mr. Kjell Larsson, Auditor-General of Sweden; and Mr. Edward Ouko, Auditor-General of the African Development Bank. In its report the Interview Panel assessed the Applicant’s performance as follows:

The panel was of the unanimous opinion that Mr. Arya’s responses failed to show any ability to raise the level of his performance as a manager and leader beyond the standard he had demonstrated as the incumbent. There was also limited evidence of his capacity to bring fresh strategic vision to UNRWA’s oversight functions or to
transform the department into a new role commensurate with the higher profile intended from its restructuring.

Mr. Arya answered technical questions adequately, particularly those related to internal and external audit functions. However, the panel was disappointed at his inability to provide analytical insight into the new post, its expanded functions, its opportunities and challenges. In particular, Mr. Arya was unable to show clearly and convincingly that he had the ability to take the position to the expected “new level”. On the contrary, Mr. Arya’s responses strongly suggested that he did not have a sound grasp of the upgraded role and that his inclination would be to continue to manage the department in the same manner as he had since he joined UNRWA. He was unable to offer strategic insights on the position he was applying for, in spite of several invitations to do so…

*          *          *

Regarding the new responsibilities to be brought under the expanded oversight function, Mr. Arya was found to lack experience in evaluation. His responses suggested that his understanding of the investigations function and its related management responsibilities was limited…His views on the distinction between audit and investigations procedures left much to be desired and there were shortcomings in his account of the inter-relationships between investigations, risks and audits.

The Interview Panel concluded that the Applicant was not a suitable candidate for the post of D/DIOS, D-2 and instead unanimously recommended one of the external candidates.

17. The recommendation of the Interview Panel was supported by the Director of Human Resources and approved by the Commissioner-General on 28 June 2009.

18. On 1 July 2009, in a meeting at UNRWA Headquarters, Amman, the Deputy Commissioner-General orally informed the Applicant that he had not been selected for the upgraded post of D/DIOS.

19. On 14 July 2009, the Applicant met Ms. Moussa, the Director of Human Resources, to discuss the consequences of his non-selection.
20. By e-mail dated 21 July 2009, Ms. Koning AbuZayd provided the Applicant with draft ratings and comments for his 2005-2007 PER “for discussion and finalization”.

21. By e-mail dated 2 August 2009 the Applicant responded to Ms. Koning AbuZayd stating that he could not accept the proposed ratings and comments. He suggested that the ratings and comments were based on “hearsay” and several of these were “without basis”. The Applicant concluded by stating:

   In short, the entire exercise of writing PAR for professional development has been lost by lapse of time. What has been presented now is also devoid of what you did/did not do to support the oversight function. It certainly ignores significant accomplishments and fails to objectively portray positively any of my achievements.

22. On 6 August 2009, the Applicant met again with Ms. Moussa to further discuss his separation from the Agency and efforts to find new employment.

23. By e-mail dated 17 August 2009, the departing Comptroller sent an “Open Letter to the Commissioner-General” to Ms. Koning AbuZayd and several other senior staff members. The letter set out a number of concerns and allegations about the management of UNRWA.

24. By e-mail dated 19 August 2009, the Applicant, who had been copied on the e-mail, responded that DIOS had registered six cases for preliminary assessment and investigation as a result of the letter. The Applicant’s e-mail was copied to all of the original recipients of the open letter.

25. By e-mail dated 20 August 2009, Ms. Koning AbuZayd responded to the open letter copying all original recipients. In her e-mail she referred to the Applicant as “the outgoing Director of DIOS” when noting the cases he had registered.

26. From 21 August to 10 September 2009, the Applicant was on sick leave.

27. By e-mail dated 27 August 2009, the Applicant wrote to Ms. Koning AbuZayd copying all original recipients of the open letter. He stated that he was
“taken aback” by her reference to him as the “outgoing Director, DIOS” and that “your reference appears premature, inappropriate and unusual, especially when copied to senior management at large, several of whom inquired about it”.

28. By letter to the Applicant dated 1 September 2009, Ms. Moussa confirmed in writing that the Applicant had not been selected for the upgraded D/DIOS post and advised the Applicant of the following regarding his separation from the Agency:

…The Commissioner-General decided on 28 June 2009 to select another candidate for the post…I understand that you continue to be absent on sick leave and that no date has been given for your anticipated return to work. From 16 September 2009, you will be placed on Special Leave With Pay (SLWP) until 31 December 2009. During this period of Special Leave With Pay, you will have an opportunity to consider alternative employment options. I note that you have applied for a post in UNRWA and consideration will be given to your candidature, together with that of other applicants. Unless you secure alternative employment earlier, your fixed-term appointment with the Agency will be terminated in the interest of the Agency pursuant to Staff Regulation 9.1, effective 31 December 2009. This letter constitutes formal notice under Staff Regulation 9.3…

29. By letter dated 2 October 2009, counsel for the Applicant requested that the Commissioner-General review the decisions to upgrade the D/DIOS post, not to select the Applicant for the post, and to terminate the Applicant’s appointment. Counsel for the Applicant alleged that the decisions were:

…fatally tainted by prejudice, bias, malice and discrimination, resulted from mistakes of fact, errors of law, and erroneous conclusions, were based on a fundamental abuse of authority as well as détournement de procedure, that the “upgrade/abolition of Mr. Arya’s post was illusory, and finally, that such impugned administrative decisions evidence a concerted pattern of retaliation against Mr. Arya for carrying out his statutory audit/inspection duties.

30. By letter dated 2 October 2009 to Mr. Robert Benson, Chief of the United Nations Ethics Office, the Applicant requested intervention in his case because of a perceived conflict of interest on the part of the UNRWA Ethics Office. By e-mail dated 7 October 2009, Ms. Susan John, an Ethics Officer, responded to the
letter, informing the Applicant that the United Nations’ policy on retaliation does not apply to UNRWA staff – UNRWA has a separate policy and he should submit his complaint to the UNRWA Ethics Office in the first instance.

31. By letter dated 25 November 2009, Ms. Anna Segall, the Agency’s Legal Advisor, responded, on behalf of the Commissioner-General, to the Applicant’s request for administrative review. She explained the Agency’s decisions as follows:

The decision to reclassify the Director, DIOS (D/DIOS) post to the D2 level was taken in view of the expanded oversight functions of DIOS in such areas as programme evaluation and ethics, and the enhanced contribution D/DIOS is required to make to the strategic management of UNRWA. Expansion of DIOS’s role and upgrading of the D/DIOS post from D1 to D2 were decided in the context of a process of management reform in the Agency. The decisions were taken in a manner which was both consultative and transparent. UNRWA’s Advisory Committee on Internal Oversight (ACIO), which includes three highly qualified external members, was central to both decisions. ACIO recommended the re-design of UNRWA’s oversight function and endorsed the upgrading of the D/DIOS post. Mr. Arya was present during the ACIO meeting at which these matters were discussed. In addition, the Commissioner-General consulted with the Under Secretary General, Department of Management, informing her of UNRWA’s plans for upgrading a number of senior posts, including D/DIOS, and setting out the justification for the same.

The recruitment processes for the upgraded D2 post were also carried out in full transparency. The post was advertised internally and externally and the process from advertisement to final selection decisions was carried out in accordance with UNRWA rules and regulations and fully satisfied requirements for procedural fairness. Furthermore, the ACIO played a fundamental role in the recruitment process; they established the shortlist for interviews and conducted the interviews. Mr. Arya was interviewed for the post but was not found suitable for the expanded oversight role of DIOS and another candidate was selected as better qualified and more suited to the position.

…If in the meantime Mr. Arya is selected for another post within or outside the UN system (he has been applying to other posts for sometime and has been supported by the Agency in doing so), then he may be subject to a transfer or other form of inter-agency exchange. While the policy on managed reassignment is applicable to Mr. Arya (who has served as D/DIOS for five years), there are
no suitable reassignment options for him taking into account his academic background, professional profile, and experience and given the small number of international posts at UNRWA, particularly at the senior level. In light of these considerations, it has not been possible to reassign Mr. Arya to another post within the Agency and his appointment is therefore set to be terminated in accordance with the Agency’s rules and regulations.

32. By letter dated 15 December 2009, the Applicant submitted a pro forma Statement of Appeal and on 23 February 2010 the Applicant submitted a “corrected Statement of Appeal” to the Secretary of the Joint Appeals Board.

33. On 25 June 2012 the Respondent filed his reply to the application.

34. By Order No. 015 (2012) dated 2 July 2012, the Tribunal ordered the Applicant to clarify the nature of his claim of retaliation and to include details of any use he made of internal mechanisms for reporting such complaints. The Applicant was also ordered to provide a succinct summary of the procedural errors and extraneous factors that he alleges impugned the legitimacy of the decisions not to appoint him to the upgraded D/DIOS post and to terminate his contract. The Respondent was ordered to answer a series of questions relating to the selection exercise for the upgraded post of D/DIOS and the new functions added to the post.

35. On 16 July 2012 the parties each filed a Response to Order No. 015 (2012).

36. On 30 July 2012, the parties each filed further submissions responding to the submissions of the opposing parties.

37. By Order No. 035 (2012) dated 29 August 2012, the Tribunal ordered the parties to respond to a series of questions relating to the receivability of the Application.

38. On 5 September 2012, the parties filed Responses to Order No. 035 (2012).

39. A case management discussion (“CMD”) was held on Tuesday 18 September 2012. The Judge expressed concern at the volume of documentation
submitted to the Tribunal and the diffuse nature of some of the issues raised. There was a need to focus on key issues, which needed to be particularized concisely. The Judge also expressed the preliminary view that a hearing on the merits would be required.

40. By Order No. 046 (2012) dated 30 September 2012, the Applicant was ordered to provide concise submissions in support of a number of his contentions and provide precise particulars in support of his allegations. The Respondent was also ordered to provide further information and documents to assist the Tribunal on a number of issues. The parties were asked to indicate whether they wished to explore an alternative resolution to the dispute.

41. On 29 November 2012, in his response to Order No. 046, the Applicant stated that the parties had attempted to find an alternative resolution but despite “productive efforts and good intentions”, alternative resolution had not been possible. The Applicant also notified the Tribunal of his decision to discharge his counsel and requested that the Tribunal decide the case based on the documents already filed and without a hearing. The Applicant did not comply with a number of the Tribunal’s orders to define his claim clearly and concisely.

42. On 30 November 2012, the Respondent filed a Response to Order No. 046 (2012).

43. A second CMD was held on 3 April 2013.

44. By Order No. 006 (2013) dated 7 April 2013, the Applicant was ordered to comply with all outstanding orders made by Order No. 046 (2012) and granted leave to file a rebuttal to the Respondent’s response to that order. The Respondent was granted leave to respond to the Applicant’s responses.

45. On 3 June 2013, the Applicant filed his response to Order No. 006 (2013). The Response was transmitted to the Respondent on 4 June 2013.

46. On 18 June 2013, the Respondent filed his response to Order No. 006 (2013). The Response was transmitted to the Applicant on 19 June 2013.
47. A third CMD was held on 20 June 2013. The parties agreed that a split judgment would be appropriate, with the initial question of liability to be determined first and, if applicable, the issue of remedies to be considered in a separate judgment. The Judge explained the difficulties of proving retaliatory motives based solely on documentary evidence. Both parties confirmed that they were content for the case to be decided based on the documents before the Tribunal. The Tribunal agreed to suspend proceedings for two weeks to provide the parties with a further opportunity to seek an alternative resolution to the dispute.

48. On 4 July 2013, the Respondent notified the Tribunal that the parties had been unable to achieve an alternative resolution of this dispute.

Applicant’s contentions

49. The Applicant formulated his contentions as follows:

(i) The reclassification and upgrade of his former post was “illusory” and a pretext for getting rid of him for performing his audit and investigation functions correctly.

(ii) The reclassification of the D/DIOS post was performed unilaterally without complying with the United Nations’ classification rules.

(iii) The impugned decisions were retaliatory acts against him for performing his audit and investigation duties and were in violation of the United Nations’ whistleblower protection policy.

(iv) The decisions were tainted by prejudice, bias, malice, mistake of fact, erroneous conclusion of fact, and errors of law.

(v) The impugned decisions violated UNRWA’s internal audit charter.

(vi) The decision to terminate his appointment was in violation of UNRWA’s policy on rotation.

(vii) Procedural irregularities, such as the failure to complete PERs, violated due process.

(viii) The retaliation, harassment, and damage to the Applicant’s career demand compensation.
50. In his Response to Order No. 006 (2013), the Applicant’s request for a remedy was cast rather widely as follows:¹

(i) Damages in an amount equal to at least two years’ emoluments in consideration of the claim of prejudice, bias and maladministration as evident in the selection process for the upgraded post.

(ii) Damages in an amount equal to at least two years’ emoluments in consideration of the claim of retaliation by abolishing his existing post and terminating his fixed-term appointment.

(iii) Reinstatement retroactively from the date of termination, restoration of all titles, roles and functions, and payment of all salary, benefits, adjustments, indemnities and other emoluments that he would have received from the date of termination to the date of the expiration of his fixed-term contract.

(iv) In the event that he is not reinstated, payment of all salary, benefits, adjustments, indemnities, pension contributions and other emoluments that he would have received from the date of termination to the date of the expiration of his fixed-term contract.

(v) Costs and legal fees of at least $50,000.

(vi) An award of interest on all sums from the date of termination to the date of payment at the US prime rate applicable on the due date of payment.

(vii) Such other relief as the Tribunal deems fair, equitable and just.

**Respondent’s contentions**

51. The Respondent contends that:

(i) The upgrading and selection process for the post of D/DIOS, D-2 was properly effected.

(ii) The decision to terminate the Applicant’s fixed-term contract was a proper exercise of the Respondent’s discretion.

(iii) The decisions were not retaliatory.

(iv) The decisions were not tainted by prejudice, bias, malice, mistake of fact, erroneous conclusion of fact or error of law.

¹ Remedies as requested by the Applicant in his Response to Order No. 006 (2013) dated 3 June 2013. The Tribunal relies on the Applicant’s latest submission on remedies rather than the original Statement of Appeal filed over three years ago.
(v) The Agency did not violate its reassignment policy.

(vi) The element of the Application regarding failure to complete PERs is not receivable.

(vii) The relief sought by the Applicant has no legal basis.

Consideration

A. Preliminary issue: receivability of the Statement of Appeal and the Reply

Did the Applicant request administrative review of the contested decisions within the deadlines applicable at the time?

52. Former International Staff Rule 111.3 provided:

(a) A staff member who, under the terms of Regulation 11.1 wishes to appeal against an administrative decision, shall as a first step address a letter to the Commissioner-General, requesting that the administrative decision be reviewed. Such a letter must be sent within two months from the time the staff member received notification of the decision in writing.

[...]  

(d) An appeal shall not be receivable by the Joint Appeals Board unless the above time limits have been met, provided that the Board may waive the time limits in exceptional circumstances.

53. The Applicant contested three main administrative decisions: the decision to reclassify the D/DIOS post, the selection decision for the upgraded post, and the decision to terminate his appointment.

54. The Tribunal finds that the Applicant was notified in writing of the decision to reclassify the post he encumbered on 22 March 2009 when the vacancy announcement was issued. It is clear that he was aware of the reclassification decision when he wrote to Ms. Koning AbuZayd on 12 April 2009 to discuss the vacancy. However, his request for administrative review was not submitted until 2 October 2009, more than five months later. The Respondent did not contest the receivability of this element of the appeal and responded to the Applicant’s submissions in respect of this decision in both the letter from Ms. Segall dated 25 November 2009 and in the Respondent’s Reply. However, Article
8(3) of the Tribunal’s Statute provides that “[t]he Dispute Tribunal shall not suspend, waive or extend the deadline for decision review”. The Tribunal does not have the jurisdiction to waive the deadline for administrative review applicable under the former International Staff Rules and therefore finds that this element of the appeal is not receivable. Nevertheless, the Tribunal considers it necessary to examine the question whether the reclassification was a bona fide exercise, not as a distinctly separate cause of action but as part of the necessary background which is inextricably connected to the primary thrust of the Applicant’s case that the entire process was designed to ease him out of his position as an act of retaliation.

55. He was informed in writing of his non-selection to the upgraded post of D/DIOS and the pending termination of his appointment by letter dated 1 September 2009. His request for administrative review was dated 2 October 2009. The request for administrative review in respect of these decisions is therefore in time.

56. The Respondent correctly submitted that the failure of the Agency to complete timely PERs for the Applicant is not receivable as a separate claim because it was not identified as a contested decision in the Applicant’s request for administrative review. The Applicant appeared to concede this point in his Appeal but urged consideration of the issue when considering the level of damages to which he would be entitled should his claim succeed. The Tribunal finds that the failure to complete PERs on time and any effect that this had on the Applicant’s prospects for obtaining alternative employment is not receivable as a separate head of claim and will not be considered by the Tribunal. The Applicant did not submit that his candidacy for the upgraded post of D/DIOS, D-2 was detrimentally affected by the absence of PERs documenting his performance in the role.

_Did the Applicant file his statement of Appeal within the deadlines applicable at the time?_

57. Ms. Segall responded to the Applicant’s request for administrative review on 25 November 2009. Under the former International Staff Rules, the Applicant had one month, or until 24 December 2009, to submit his appeal. His _pro forma_
Statement of Appeal is dated 15 December 2009 but is date stamped as received by a Human Resources Officer on 24 January 2010. The Joint Appeals Board was abolished in 2009 and there was a considerable period during which there was no administrative machinery to process applications under the formal system of justice. In the circumstances, the Respondent did not contest the receivability of the Statement of Appeal in terms of compliance with the relevant deadlines. In any event in the absence of cogent evidence regarding the arrangements for receiving applications pending the establishment of the UNRWA DT, the Tribunal cannot place reliance on the date stamp to rebut the presumption that the appeal was submitted when it was signed. The Tribunal accepts the Statement of Appeal as receivable, noting, however, the Respondent’s submission that certain elements of the appeal that were not subject to administrative review are not receivable.

Did the Respondent file his Reply within the deadlines applicable at the time?

58. According to the record, the full Statement of Appeal was transmitted to the Respondent by Inter Office Memorandum on 8 March 2010. The Respondent’s Reply was received by the Tribunal on 25 June 2012, over two years after the Respondent received the Appeal. In response to Order No. 035 (2012) concerning the receivability of the Appeal, the Applicant noted the Respondent’s lengthy delay in responding to his Appeal, but did not expressly object to its acceptance by the Tribunal.

59. The former International Staff Rules did not provide a deadline for the Agency to respond to an appeal, however, Article 6(1) of the Tribunal’s Rules of Procedure, which came into effect on 1 June 2010, provides that:

The Respondent's reply shall be submitted within 30 calendar days from the date of receipt of the application by the Respondent in one signed original together with annexed documents, which may be electronically transmitted. The Respondent who has not submitted a reply within the requisite period shall not be entitled to take part in the proceedings except with the leave of the Tribunal.
60. The Tribunal has power under Article 30 of the Rules of Procedure to shorten or extend a time limit fixed by the Rules or to waive any rule when the interests of justice so require. Pursuant to Article 14 of the Rules, the Tribunal may make any order or give any direction which appears to be appropriate for a fair and expeditious disposal of the case and to do justice to the parties. In determining whether or not to accept the late Reply, the Tribunal considered the administrative difficulties and delay in establishing the Tribunal, and the need to manage the backlog of cases in an orderly manner. Each case has to be considered on its own merits and the Tribunal takes note that time limits are to be complied with and that the Agency was remiss in not putting in place the necessary machinery to deal with cases under the new system of justice. Notwithstanding these strictures, the Tribunal considers that in the particular circumstances of this case it is in the interests of justice – and that it would be appropriate for a fair and expeditious disposal of the case and would do justice to the parties – for the Tribunal to extend the time limit under Article 6 and accept the late filing of the Respondent’s Reply. It is also the Tribunal’s assessment that, given the complexity of the factual and legal issues involved in this case, submissions from both parties will better equip the Tribunal to render a fair and comprehensive judgment. The Tribunal therefore grants leave to the Respondent to file a late Reply and to participate in these proceedings.

B. Was the reclassification of the D/DIOS post from grade D-1 to D-2 part of a genuine restructuring exercise?

61. A central argument in the Applicant’s case is his submission that the reclassification of the D/DIOS post was a pretext to remove him from his position and to prevent him from performing his audit and investigation functions correctly. The Applicant submits that the upgrade was “illusory” and that the post was “padded” with additional functions that were “management core functions” and were incompatible with the role of the D/DIOS. The Respondent submits that it had legitimate reasons for restructuring the DIOS and creating the D/DIOS, D-2 post.

2 With the exception of the deadline for decision review.
62. The Commissioner-General has the discretionary authority to reorganize and restructure the Agency and its various departments and posts in order to meet the needs and objectives of the Agency at a particular time. It is not for the Tribunal to dictate to the Commissioner-General how to manage the Agency. The Tribunal will not interfere with a genuine restructuring even if it may have resulted in the loss of employment of a staff member; provided, however, that the decision was not motivated by retaliatory or other extraneous factors and was not procedurally flawed. Reorganizing and restructuring of the workplace should not be used as a mechanism for getting rid of an employee whose presence in the workplace is, in the opinion of the managers concerned, no longer in the interest of the Agency. Issues relating to an individual’s conduct are to be dealt with through the appropriate internal procedures and not by effectively restructuring them out of a post.

63. In Order No. 006 (2013) the Tribunal ordered the Applicant to state when and by what means he lodged his concerns or objections prior to his application for promotion to the upgraded post. In response to the order, the Applicant referred to and annexed an e-mail he sent to Ms. Koning AbuZayd on 12 April 2009. In the e-mail the Applicant stated:

The ACIO meeting #25 held on 30 Nov – 1 Dec 2008 discussed the re-organization of the DIOS function. The ACIO expressed support for the suggestion that Director post should be a D-2. The revision of post description followed. I felt personally elated by the fact that the unique position of the department in the Agency…has been recognized…The mechanism is today mature enough to elicit confidence and trust for additional broad oversight responsibilities.

The Applicant then went on to express his concern that the vacancy had been advertised externally as well as internally and requested clarification as to what would happen in the “worst case scenario” of his non-selection to the upgraded post.

64. The evidence produced by the Applicant does not support a finding that he had genuine concerns about the new job description for the upgraded post and the compatibility of the additional functions with the role of D/DIOS. On the
contrary, he indicated that he was “elated” by the decision to upgrade the post and expressed a view that DIOS was “mature enough” to take on additional oversight responsibilities. It was only when he became aware that the post would be advertised externally, and that there was a real possibility that he may not be appointed to the new post, that he became concerned. The concerns he expressed to the Commissioner-General were personal concerns about his future with the Agency rather than operational concerns about the validity of the new post description. In the absence of evidence to the contrary, the logical conclusion is that the Applicant was content for the post of D/DIOS to be upgraded and entrusted with additional responsibilities so long as he was the one who was to be selected to the upgraded post. This finding fatally undermines the Applicant’s contention that the new functions and responsibilities to be added to the D/DIOS post would be unworkable from an operational viewpoint, thereby implying that they were only added to the post to justify a new recruitment process.

65. The Tribunal defers to the judgment of the ACIO on this matter, and in particular its three expert external members. The Applicant has not placed before the Tribunal evidence impugning their independence, integrity and competence. The Tribunal is satisfied that the expansion of the oversight responsibilities of the DIOS, and the subsequent upgrade of the D/DIOS post, was a legitimate and genuine restructuring decision not tainted by improper motives or extraneous factors. Nor was the process procedurally flawed.

C. Was the selection process for the post of D/DIOS, D-2 properly conducted?

Legal and administrative framework

66. International Staff Regulation 4.1 provides:

The Commissioner-General shall appoint staff members.

67. International Staff Regulation 4.3 provides:

The paramount consideration in the appointment, transfer or promotion of the staff shall be the necessity for securing the highest standards of efficiency, competence and integrity. Due
regard shall be paid to the importance of recruiting staff on as wide a geographical basis as possible.

68. International Staff Regulation 4.4 provides:

In accordance with the principles of the Charter of the United Nations, selection of staff members shall be made without distinction as to race, sex or religion. So far as practicable, selection shall be made on a competitive basis.

69. International Staff Regulation 4.5 provides:

With due regard to the recruitment of fresh talent, and on as wide a geographical basis as possible, preference shall be given to persons already in the service of the Agency who have the requisite qualifications and experience.

70. A new International Staffing Policy came into effect on 1 April 2009 pursuant to International Personnel Directive I/104.2/Rev.1. IPD I/104.2/Rev.1 provided in relevant part:

1. All international staffing activities carried out by the Agency will be guided by the following principles:

   * * * *

   • Maximum post occupancy period normally not to exceed five years; periodic rotation of staff to maintain and enhance skills and versatility.

   * * * *

6. The authority of the Commissioner-General to make decisions regarding the appointment of international staff up to an including the D-2 level is contained in International Staff Regulation 4.1...

   * * * *

42. Candidates will be interviewed in person or via video-conference. Candidates will be evaluated against the requirements set out in the post description and vacancy notice.

   * * * *

46. The Hiring Director will record his/her selection decision on the report, or forward the selection report together with his/her recommendation to the DHR who will then scrutinize the recommendation for compliance with policies
and procedures and then present the case to the Commissioner-General for decision…

*                    *                    *

57. First preference for selection should normally be given to internal candidates, where internal and external candidates are equally qualified, including performance considerations.

71. Organization Directive No. 24 (“OD No. 24”) enacted the Charter of the ACIO effective 15 April 2008. The Charter set out the responsibilities of the ACIO, which include providing recommendations on the appointment of the D/DIOS. Paragraph 21 of the version of the Charter in effect at the material time provided:

The committee shall carry out the following responsibilities:

*                    *                    *

d. Recommend to the Commissioner-General with regard to the appointment and termination of the Director/DIOS. For the purpose of appointing, the Director/DIOS, the committee shall constitute itself as the interview panel (subject to the quorum rules)…”

Relevant legal principles

72. The Tribunal notes that the Commissioner-General has broad discretion in making decisions regarding appointments. In reviewing such decisions, it is not the role of the Tribunal to substitute its own decision for that of the Respondent regarding the outcome of the selection process. In other words, it is not for the Tribunal to assess the merits of the candidates for the position in question. However, the discretion of the Respondent is not absolute and the Tribunal will examine whether the procedure, as set out in the Staff Regulations and Rules and other relevant issuances, was followed, and whether the staff member was given fair and adequate consideration. As held by the United Nations Appeals Tribunal in Abbasi 2011-UNAT-112, paragraph 26:

The UNDT has jurisdiction to rescind administrative decisions concerning the selection of staff on certain grounds. A decision not to select a staff member may be rescinded in circumstances where he or she did not receive fair and adequate consideration, there has
been any kind of discrimination or bias against the staff member, or the proper staff selection procedures were not followed.

Considerations

73. The Tribunal has already determined that the upgrade of the D/DIOS post from grade D-1 to D-2 was a lawful exercise of the Agency’s managerial prerogative. The Tribunal also rejects the Applicant’s claim that certain members of the Interview Panel had already decided to replace him and therefore the selection decision itself was tainted by bias and a conflict of interest. The Applicant has produced no affirmative evidence to support such a finding or evidence from which it would be legitimate to draw such an inference.

74. The Applicant submits that “traditionally D2 positions have been filled by internal candidates”. International Personnel Directive No. I/104.2 was in effect at the time of the issuance of the vacancy notice in March 2009 and set out the Agency’s recruitment policy for international staff at the time. It stipulates at paragraph 2.2.6 that vacancies are to be issued both internally and externally. Paragraph 3.5 reiterates that the Agency places “high emphasis” on advertising both internally and externally in order to obtain the best qualified and experienced staff.

75. The Tribunal ordered the Respondent to provide examples covering the previous three years where a senior position had been upgraded as a result of increased responsibilities and the position was advertised externally and internally and to state whether the incumbent was successful or not. The Respondent provided one example where a D-1 position was upgraded to D-2 after an expansion of duties and the post was advertised externally as well as internally. The incumbent withdrew his candidacy prior to the personal interview. The other examples provided by the Respondent were posts that were upgraded without an expansion of duties. The Respondent did not state whether these positions were advertised externally but the Tribunal infers that they were not. While noting that the Applicant raised this point with the Commissioner-General in his e-mail dated 12 April 2009, the Tribunal finds that the Respondent was acting according to its own recruitment policy when it advertised the D/DIOS post externally. The Applicant has not placed before the Tribunal any evidence or argument of
substance for the Tribunal to conclude that the Applicant was discriminated against in comparison with the treatment accorded to others.

76. The Applicant asserts that his own qualifications were superior to those of the Selected Candidate and that the latter failed to meet the requirements for the upgraded post in that he did not have sufficient experience in the areas of programme evaluation, ethics, and risk assessment, the additional functions that supposedly justified the upgrade of the post.

77. The interview panel’s assessment of the Selected Candidate included the following observations:

…The panel took the view that [the Selected Candidate] was the candidate with the widest range of knowledge and experience across the spectrum of oversight functions.

…While audit and investigations are his strength, his ethics and evaluation experience was considered sufficiently strong to entrust him with leading and managing those functions in the DIOS context. His duties as Senior Auditor for the Court of Accounts of France encompass evaluation work, albeit within the parameters of reviewing financial accountability, while issues relating to ethics would be expected to be integral to the senior roles he has played in the course of his career. The panel noted the strength of [the Selected Candidate’s] experience conducting risk assessments.

78. The Interview Panel found that the Selected Candidate had the required skills and experience in the new functions and they considered that he was more suitable than the Applicant. In the absence of any cogent arguments or a sufficiency of evidence to support the Applicant’s contention, the Tribunal has no basis upon which it may impugn the decision. It is not for the Tribunal to substitute its judgment for a properly constituted interview panel, particularly when the panel included three highly qualified members from outside the Agency.

79. The Tribunal notes that according to the interview report, “the interview process focused on the assessment of the key competencies for the DIOS position, while also assessing the candidates against the high level strategic leadership capabilities that the incumbent must fulfill in support of the Commissioner General.” It was in this area that the Applicant was found to be lacking. The
Interview Panel noted that he produced limited evidence of his capacity to bring “fresh strategic vision” and was unable to show “clearly and convincingly that he had the ability to take the position to the expected new level”. When first confronted with this evidence the Tribunal was skeptical of the Interview Panel’s assessment that the Applicant had performed so poorly at the interview. The Tribunal noted that the Applicant had encumbered the post, albeit at D-1 level, and had been involved and/or been fully aware of the policy discussions and considerations leading to the expanded role and functions. However, the Tribunal takes into account that there were three independent members on the Panel. In the absence of a sufficiency of evidence in support of the Applicant’s contentions, the Tribunal accepts that there was no procedural impropriety or bias infecting the interview process and the Panel’s recommendation to prefer another candidate.

80. Paragraph 57 of PD I/104.2/Rev.1 states that preference should be given to internal candidates where internal and external candidates are equally qualified. However, the Interview Panel did not find that the Applicant and the Selected Candidate were equally qualified. The Applicant was found to be unsuitable for the upgraded post.

81. In response to Order No. 015 (2012) the Respondent confirmed that none of the members of the Interview Panel knew the Selected Candidate at the time of the interview. In the absence of evidence that the panel members were improperly influenced to assess the Applicant negatively the Tribunal cannot impugn their integrity and their judgment.

82. The Applicant submits that the appointment of the new D/DIOS should have been subject to review by the Senior Review Group, a body that advises the Secretary General on senior appointments. This is a requirement set out in an Administrative Instruction of the United Nations Secretariat. The Agency has its own recruitment policy, which at the material time was set out in IPD 104.2/Rev.1. It expressly stated that the Commissioner-General had the authority to make appointments of international staff up to an including the D-2 level (see paragraph 70 above).

D. Did the Agency violate its managed reassignment policy
Legal and administrative framework

83. IPD 104.2/Rev.1 on the International Staffing Policy for the Agency provided in relevant part:

Managed reassignments

Policy on managed reassignments

21. The purpose of the policy on managed reassignment contained in this Directive is to ensure that staff maintain and enhance their skills and versatility by moving periodically to new assignments, which may involve a change in duties and/or location.

22. The managed reassignment policy will apply to all international staff appointed against UN-funded posts at the D-2 level and below…

23. Under the managed reassignment policy the normal maximum post occupancy period is five years…

24. The Commissioner-General may exempt staff members occupying certain posts from the policy in the interest of the Agency, for example in a case in which an incumbent occupies a highly specialized or technical post and there are therefore no suitable reassignment options for him/her within the Agency.

84. The Applicant submits that the decision to terminate his contract violated the Agency’s “rotation” policy and that “several procedural and substantive irregularities can be observed in the application of the ‘managed reassignment’ or rotation policy” which impacted him.

85. The Respondent submits that it was impossible to reassign the Applicant to another post within the Agency because there were not suitable reassignment options at the senior level.

86. The managed reassignment policy was applicable to the Applicant while he was in his post but was not applied. Consequently, the Applicant was able to stay in his post for six years without being reassigned. The post that the Applicant occupied was effectively abolished and he was not selected to the upgraded post of D/DIOS, D-2. The Tribunal does not agree with the parties that the managed reassignment policy applied to the Applicant after he was unsuccessful in his
application for the upgraded post. The clear purpose of the policy as stated in IPD 104.2/Rev.1 is to enhance the skills and versatility of staff members through periodic rotation. It does not appear from the wording of the policy that it was intended to provide staff members in the situation of the Applicant with a right to reassignment when they are rendered effectively redundant.

87. The Tribunal notes that in his Statement of Appeal the Applicant stated:

…the Appellant was verbally informed (1 June 2009) by Mr. Filippo Grandi, DCG who headed the interview panel that they had selected an external candidate at D-2. He further informed the Appellant that the main consideration for his non-selection was the S-G’s bulletin that restricts the tenure to 5 years and that the Appellant was in his position for more than 6 years.

The Applicant has not produced any evidence to support his assertion that Mr. Grandi informed him that his length of tenure in the D/DIOS post was the main reason for his non-selection and the Tribunal did not have the opportunity to test the assertion at a hearing. Consequently, the Tribunal must assume that the reasons for the Applicant’s non-selection are those set out in the Interview Panel’s Interview Report. The Agency’s managed reassignment policy is therefore not relevant to this case.

E. Was the decision to terminate the Applicant’s fixed-term contract properly made?

Legal and administrative framework

88. International Staff Regulation 9.1 provides:

The Commissioner-General may at any time terminate the appointment of a staff member if, in the Commissioner-General's opinion, such action would be in the interest of the Agency.

89. Paragraph 21 of OD No. 024 in effect at the material time provided:

The committee shall carry out the following responsibilities:

*        *        *

d. Recommend to the Commissioner-General with regard to the appointment and termination of the Director/DIOS…The
committee may convene a special meeting for the purpose of advising the Commissioner-General on terminating the services of Director/DIOS.

Considerations

90. The Tribunal has already found that the managed reassignment policy did not create an obligation on the Agency to reassign the Applicant after his non-selection to the upgraded post of D/DIOS. The Applicant has not referred to any other regulation, rule or issuance creating such an obligation. However, the Applicant did seek clarification and reassurance from Ms. Koning AbuZayd about his future within the Agency in the meeting of 14 April 2009. It appears from the Applicant’s e-mail of 26 April 2009 summarizing that meeting that Ms. Koning AbuZayd “assured [the Applicant] that the assignment will be pursued in a worst-case scenario. In the worst case if an appropriate post is not available, sufficient time will be made available to seek opportunities elsewhere.” The Respondent did not dispute that this representation was made and consequently, the Tribunal finds that the Commissioner-General was bound by the promise she gave to the Applicant. Through her representation to the Applicant she created an obligation on the part of the Agency to make all reasonable efforts to reassign him.

91. The Respondent submitted that:

While the Agency supported the Applicant’s applications for other posts within and outside of UNRWA, it was not obliged to find an alternative post for the Applicant within the Agency, and despite reasonable efforts by the Agency, it was unable to match the Applicant’s background and qualifications with the limited, vacant senior-level international posts.

92. The Tribunal notes that the Applicant applied for the vacant post of Director of Finance and was interviewed for the post but was ultimately unsuccessful. No evidence has been produced to impugn the propriety of that selection exercise. A review of the Agency’s organizational structure and post distribution chart supports the Respondent’s contention that there were limited senior international posts for which the Applicant would be suitable given his specialized qualifications, experience and skill set and that at that time, it was
unable to match the Applicant to a vacant post. While the Tribunal finds that the Respondent did have an obligation to make reasonable efforts to find the Applicant an alternative post, it is satisfied with the Respondent’s explanation as to why those efforts were unsuccessful.

93. By Order No. 046 (2012) dated 30 September 2012, the Tribunal ordered the Respondent to indicate what steps were taken in order to assist the Applicant in finding alternative employment prior to the termination of his employment. Having reviewed the Respondent’s answer the Tribunal finds that the Agency did provide assistance and support to aid the Applicant in finding alternative employment. This assistance included offering the Applicant Special Leave With Pay (“SLWP”) during his three month notice period so that he could look for employment or, alternatively, an assignment which would allow him to spend part of his time searching for alternative employment. According to a Note for the Record, Ms. Moussa also stated that the Agency would be willing to consider extending the period of SLWP for one or two months should the Applicant locate another job and need a “bridging arrangement” between the two jobs.

94. The Applicant submitted that under OD No. 24, the ACIO should have been convened to advise the Commissioner-General on the termination of his services. The Respondent is correct in noting that there was no such requirement as the relevant provision states that the committee may convene a special meeting for the purpose of advising the Commissioner-General on terminating the services of Director/DIOS. The ACIO would have been aware of the immediate consequences for the Applicant when they endorsed the selection of another candidate for the D/DIOS post. Whether the Applicant’s contract should be terminated or he should be retained by the Agency in some other capacity was not an appropriate matter for the ACIO to consider.

95. The Applicant having been rendered effectively redundant after his non-selection to the upgraded post of D/DIOS and no other suitable vacancies being available, the Tribunal finds that the decision of the Commissioner-General to terminate the Applicant’s fixed-term contract in the interests of the Agency was
within her discretion under International Staff Regulation 9.1 and was properly made.

F. Has the Applicant shown that the upgrade of his post, his non-selection to the new post, and/or the termination of his contract were acts of retaliation?

96. The first question to determine is whether the Tribunal has jurisdiction to consider the claim of retaliation. The Agency’s retaliation policy is set out in General Staff Circular No. 5/2007 of 31 December 2007, which includes an internal procedure for reporting retaliation. An individual who believes he or she has been subject to retaliation may lodge a complaint to a number of listed senior staff members of the Agency, including the D/DIOS. All complaints that are not received in the first instance by the D/DIOS will be forwarded to the D/DIOS by the staff member who receives them and the D/DIOS is then obliged to investigate the complaint. The Applicant submits that his case was unique because he was both the staff member responsible for receiving and investigating complaints of retaliation and an alleged victim of retaliation himself.

97. In any case, paragraph 4 of GSC 5/2007 provides:

The procedures set out in this circular are without prejudice to the rights of an individual claiming to have suffered from retaliation to seek redress through the Agency’s normal recourse mechanisms. An individual may raise violation of the provisions of this circular in any such proceedings.

Accordingly, the Tribunal may consider a complaint of retaliation regardless of whether the complainant utilized the internal procedures set out in GSC 5/2007.

98. The next question is whether the Applicant can show that he engaged in a “protected activity” within the meaning given to that phrase in GSC 5/2007. Paragraph 5 of GSC 5/2007 provides:

“Protected activity” means the action of an individual who –
(i) reports, in good faith or on reasonable grounds, allegations or complaints of misconduct, misappropriation of Agency assets, fraud, corruption or abuse of authority; or
(ii) cooperates in good faith with duly authorized audits or investigations.
99. The Applicant submits that since cooperating in good faith with duly authorized audits and investigations is a protected activity, “by logical construction and extension of the rule and the principle”, those professionally and lawfully engaged in auditing and investigating are also engaged in a protected activity. Though the Applicant’s submission has some merit in that the actual performance of individual audit or investigation functions could and perhaps should be construed as protected activities in certain circumstances, it is not enough for the Applicant to simply point to the general auditing and investigation functions of his role as an all-inclusive “protected activity”. He has to point to specific acts or activities that he engaged in that provided the Agency, and in particular those involved in the decision under challenge, with a motive to retaliate against him.

100. The Applicant has referred to two specific examples. The first is the publication in July 2008 of a report he co-authored after his department conducted an Agency-wide Risk Assessment. The Applicant submits that issues he identified in the section of the report addressing governance and strategic issues such as “award of high value contracts” and “transparency in recruitment of international staff” should constitute a protected activity. The Tribunal agrees that highlighting these as issues within the Agency should properly attract protection within the meaning of Paragraph 5 of GSC 5/2007. They are protected acts. The second example is a 2005 e-mail from the Applicant to Ms. Koning AbuZayd in which the Applicant recalled concerns raised by one of his colleagues in regards to three incidents involving alleged impropriety and the response of his department to those concerns. This example does not advance the Applicant’s case because he was merely reporting on the response of his department to concerns reported by another staff member.

101. The Tribunal has provided the Applicant with a number of opportunities to clarify and provide further particulars of the acts or activities that he claims were “protected activities”. The Applicant expressed on a number of occasions his conviction that he has a professional duty to maintain the confidentiality of certain information and complaints which he received from staff members in confidence during his tenure as D/DIOS at the Agency. While the Tribunal can understand
and respect the delicate situation in which the Applicant finds himself, the reality
is that in order to succeed in his claim of retaliation the Applicant must produce
sufficient evidence to support his allegation. This includes the identification of the
protected activity. It may well be the case that the nature of his duties as D/DIOS
brought him into conflict with senior management in the Agency but in the
absence of particulars it is not possible for the Respondent to challenge the
contention. The Tribunal is unable to find as fact that unspecified acts or
omissions on the part of the Applicant in the course of performing his duties
constituted protected activities and provided motivation for the Agency to subject
him to a detriment in the workplace. Therefore, the only action on the part of the
Applicant which the Tribunal considers to be a protected act is the identification
of certain questionable practices in the Risk Assessment Report published in July
2008.

102. In order to prove that retaliation occurred, the Applicant must also show
the existence of a causal link between the protected activity and an adverse or
detrimental action taken against him by the Agency. In this case the Applicant
submits that the upgrade of his post and his subsequent non-selection and
termination were all retaliatory actions. The Tribunal’s factual findings indicate
that there was no causal link between the Applicant’s role in the publication of the
2008 Risk Assessment Report and the decision to upgrade the post he was
occupying, the selection of another candidate for the upgraded post, and the
termination of his appointment.

103. In general it is relatively easier for a staff member to prove that she/he
engaged in a protected activity than it is to show that there is a causal nexus
between the fact of having engaged in a protected activity and the detriment to
which the staff member has been subjected to. In this case, the Applicant succeeds
at the first hurdle, but falls at the second because of his failure to adduce sufficient
evidence from which the Tribunal could conclude that there was a causal nexus
between the protected act referred to and the contested decisions.

104. After considering guidance given by the judge during CMDs regarding the
principles applicable in retaliation cases, both parties expressed a clear preference
for a judicial determination on the documents. In the particular circumstances of this case the Tribunal decided that it would not be appropriate to exercise its power to order an oral hearing.

**Conclusion**

105. The Applicant’s request for decision review and his initial Statement of Appeal were poorly presented, being replete with vague statements, unsupported allegations, and hearsay without addressing the relevant factual and legal issues. This placed him at a considerable disadvantage in discharging the burden of proof in such a complex case. The Tribunal has given the Applicant ample opportunity to clarify and substantiate his claims. At CMDs, the Judge also drew attention to the complexity of the case and the challenges the Applicant would face in proving his claims without an opportunity to question key witnesses. Nevertheless, both parties expressed the view that a hearing was unnecessary. Accordingly, the Tribunal considered the merits of the case on the basis of the documents, the written arguments, replies to Orders and the submissions presented by the parties. The Applicant has not met the evidential burden required to prove the essential elements of his case.

**Judgment**

106. The application fails and is dismissed.

(Signed)

_________________________

Judge Goolam Meeran
Dated this 15th day of September 2013

Entered in the Register on this 15th day of September 2013

(Signed)

_________________________

Laurie McNabb, Registrar, UNRWA DT, Amman