# JURISDICTION, DETAILS OF THE HEARING AND REPRESENTATION

1. Hearings in this arbitration were held on 14 May, 9 July and 10 September 2012. On 14 May 2012 I raised the issue of jurisdiction of the ……………having regard to the fact that the applicant was claiming an unfair labour practice in respect of his non-appointment to an acting position. The respondent indicated that it also intended raising this issue. After oral and written submissions were made by the parties, a written ruling was made on 17 May 2012 that the SALGBC did indeed have jurisdiction because such dispute falls within the meaning of “promotion” as contemplated in s 186(2)(b) of the Labour Relations Act 1995.
2. The hearings were held in a boardroom at the ………………… Durban. The proceedings were recorded. The applicant was represented by Mr…………..while the respondent was represented by Ms ……………(senior HR manager).
3. Both parties handed in bundles of documents. Except for 2 documents, the applicant admitted all the respondent’s documents as regards their authenticity and the correctness of their contents. The respondent for its part did not dispute any of the applicant’s documents.

# ISSUE TO BE DECIDED

1. The issue to be decided is whether an unfair labour practice was committed by the non-appointment of the applicant to the post of Deputy Head: Operations in the Unit (the Post) in an acting capacity. The applicant sought an opportunity to act in the position, alternatively compensation.

# BACKGROUND TO THE DISPUTE

1. The applicant is …………………, a professional engineer (task grade level 15). He commenced employment on 8 June 1993 for the respondent as an electronics technician. He earns R35 349.52 per month.
2. The first respondent is………………….a local government body. The applicant works in the Unit. It employs 3000 persons, while the municipality as a whole employs approximately 20 000 persons.
3. The second respondent is …………….., a senior manager (task grade level 17) in the water network branch of the Unit.
4. The third respondent is ……………….., a senior manager (task grade level 17) in the treatment works branch of the Unit.
5. Neither the second respondent nor the third respondent (‘the appointees’) opposed nor attended the arbitration.
6. With the applicant’s application to act in the Post being unsuccessful, he referred an unfair labour practice dispute to the ……………on 7 November 2011. The matter was set down for conciliation on 8 December 2012 but remained unresolved. Hence the referral to arbitration.
7. In narrowing down the issues, the following was agreed upon by both parties:
	1. The applicant’s dispute centred on the alleged failure of the respondent to adhere to a document (the Policy) with the heading “Acting Appointments on a Rotational Basis”. It appears to have been adopted by the bargaining forum on 4 April 1995. It is as follows:
		1. *That should a department within the City Council have, or anticipate, an extended or prolonged vacancy within that department and more than one person within that department be capable of fulfilling the duties associated with the vacant position then, at the commencement of the vacancy, the position be advertised, within the department, in order that a “pool” might be identified in order that in fairness to all eligible persons the post might revolve on a roster basis or alternatively that all such persons might have the opportunity to be considered for the acting position.*
		2. *That a vacancy be considered to be an extended vacancy when it extends over a period longer than 2 months.*
		3. *That should an extended vacancy exist and no suitable person be available within the Department concerned, then the Service Unit concerned be authorised to take the necessary steps to advertise the vacancy outside of that specific department.*
	2. The respondent invited employees to apply for the Post (task grade level 21), by way of a circular dated 31 August 2011. It did this pending the permanent filling of the post. The remuneration attached to the Post is R54 962;
	3. The requirements for the Post were: *Essential qualifications: Bachelor’s degree (engineering), or acceptable relevant qualification. Essential experience: 5 years acceptable senior managerial experience preferably in water supply and/or sewage disposal and treatment environments*;
	4. That the Head of the Unit determined, as contemplated in the Policy, who was or was not capable of fulfilling the functions associated with the Post. In other words he determined what was *acceptable* experience;
	5. That the applicant and the appointees all satisfied the requirements relating to the essential qualifications;
	6. That the dispute revolved around whether the applicant possessed the essential experience;
	7. The second and third respondents were appointed to the Post in an acting capacity: the second respondent from 1 October to 31 December 2011, while the third respondent filled the Post from 1 January to 31 March 2012. With there being a moratorium on new appointments, the appointees continue to fill the Post on a rotational basis;
	8. That when one is making an acting appointment one does not follow as stringently or rigorously the process for making the appointment as one does for the making of a substantive appointment;
	9. That the vacancy was to endure for more than 2 months;
	10. That the Unit is an essential service insofar as it supplies water to the residents of the city and that there is little room for error when making senior appointments, whether acting or not;
	11. That the following managerial duties attach to the Post as contained in the job description:
		1. *Maintains clear communication channels and ensures the effective and efficient running of the department by:*
			1. *Liaising and negotiating with government departments, other organisations and other interested parties re legal and other requirements;*
			2. *Liaising with councillors and officials;*
			3. *Liaising with commUnities and special interest groups;*
			4. *Liaising with professional and technical organisations.*
		2. *Facilitate growth and development by co-ordinating the activities of the department with other municipal departments and agencies.*
		3. *Manages and controls staff by:*
			1. *Recruiting suitably qualified and experienced people and providing appropriate training;*
			2. *Conducting regular staff assessments;*
			3. *Dealing with disciplinary and grievance procedures;*
			4. *Ensuring that people are both able and willing to fulfil their assigned responsibilities.*
		4. *Makes suggestions to the Head: Water and Sanitation re appropriate amendments to and/or scrapping of bylaws which relate to the operation of the department by keeping abreast of relevant legislation.*
		5. *Assists the Head: Water and Sanitation in formulating strategic direction for the Unit by providing specialist inputs as required.*
		6. *Formulates capital and operating budgets by taking into account performance requirements and resource allocations/constraints.*
		7. *Implements the department’s plans by:*
			1. *Ensuring that functions are appropriately grouped;*
			2. *Allocating resources between the various branch components on an optimal basis and in line with budget constraints;*
			3. *Defining areas of responsibility, clarifying areas of overlap and resolving conflicts that may arise;*
			4. *Ensuring that operating policies and procedures are appropriate and are adhered to within the department;*
			5. *Ensuring effective financial control and discipline, and maximises productivity by financial and other resource management.*
		8. *Reports to the Head: Water and Sanitation on performance in terms of agreed objectives, plans and budgets and seeks direction as required.*
		9. *Pro-actively markets the department by ensuring that consumers are made aware of the services that the department offers.*
8. The applicant disputed whether the appointees had the essential experience. (In the event, the applicant only dealt in evidence, with the experience, or lack thereof, of the second respondent.)

# SURVEY OF EVIDENCE AND ARGUMENTS

1. Only the applicant gave evidence in support of his case. ………………….the Head of the Unit, gave evidence in support of the respondent’s case. The following facts were either *agreed, common cause or undisputed in cross examination*:
	1. That the applicant is presently graded at task grade 15. The appointees occupy task grade 17 positions. While the Post itself is graded at task grade 21;
	2. That despite having served the respondent for 19 years, he was frustrated and disappointed that he was not being given an opportunity to serve in a managerial post. He had two degrees including an MBA. He had taken an advanced course in industrial relations and had received an award for having distinguished himself in that course. He pleaded to be given an opportunity to serve in a senior position to demonstrate his skills and abilities;
	3. That the applicant took a number of decisions in place of his own manager Rolf Israelson. He gave two examples: one relating to payment of simcard charges for telemetry purposes; and the input that he had made as regards the capital expenditure that may be incurred in the coming financial year in the different branches. He had taken a number of managerial decisions for 5 to 8 years;
	4. That industrial relations was an important component of the Post. For his part, the applicant had dealt with one incident of disciplinary action when he had acted as prosecutor in the case. He had not chaired any disciplinary hearing;
	5. That the applicant had not been invited to Unit forums where only managers are invited. Hence he had limited knowledge relating to overtime, shift systems and allowances. He also had hardly any dealings with trade union officials and shop stewards;
	6. That the second respondent had 3 years of senior managerial experience;
	7. That the applicant had spoken to Macleod about revising the organogram with a view to creating opportunities for persons in his position to fulfil more challenging duties. Macleod confirmed that he had done so but that it required approval from the city manager’s office. There was a moratorium on senior appointments at present;
	8. That the applicant had not acted, or been asked to act, on behalf of his own manager Israelson;
	9. That 12 persons reported to the applicant; 601 reported to the second respondent; and 1066 reported to the third respondent;
	10. That Macleod did not consider the applicant to be a suitable candidate for the Post because he did not possess senior managerial experience. He considered this to be an essential requirement. He had known the applicant for about 20 years and valued the applicant’s work. The Post entailed high levels of stress and required someone with a proven track record. Having regard to the fact that the Unit was an essential service, it could not take the risk of appointing someone to the Post without the necessary experience;
	11. That the appointees had acted in the Post previously and had acquitted themselves well;
	12. That the respondent maintained three industrial relations panels: the “A”, “B” and “C” panels. Managers on the “A” panel for example dealt with the most serious and complex of cases. The applicant was not on any of these panels;
	13. Macleod considered that employees in the Unit or for that matter in any organisation had to prove themselves at their level and go to the next level. He acknowledged that the applicant had proven himself at his own level, and there existed a need to create a more challenging work environment for him, but that could not be done immediately because of the moratorium imposed by the city manager’s office;
	14. That anyone who acted in the Post would have to act in Macleod’s stead when he was away.
2. The applicant questioned during cross examination and in his evidence the second respondent’s acting appointment having regard to the fact that she only possessed 3 years of experience at senior managerial level.
3. The applicant submitted in closing that he had satisfied the essential qualifications for the Post. He submitted that he had over 5 years of managerial experience even though he was not a manager. That he had taken decisions in the place of his own manager in the field of electronic engineering. That the second respondent did not have the required level of experience but had been appointed. That he should have been offered an opportunity to act in the position.
4. The respondent submitted in closing that the respondent had complied with the Policy; and that the applicant did not have the required level of experience. It asked for the application to be dismissed.

# ANALYSIS OF EVIDENCE AND ARGUMENT

1. The operative clause in paragraph 1.1.1 of the Policy is “*That should a department within the City Council have, or anticipate, an extended or prolonged vacancy within that department and more than one person within that department be capable of fulfilling the duties associated with the vacant position then ...*”.
2. It was common cause that the person who determined whether one was *capable of fulfilling the duties associated with the vacant position* was Macleod. He is the Head of the Unit. It was undisputed that from the vantage point that he occupied he was capable of making that determination. In this regard it is important to recall the function of the arbitrator: it is not for him or her to decide who is best suited for the job. That is the domain of the employer. As long as the employer makes such decision fairly and on the basis of objectively verifiable facts, the arbitrator cannot interfere. I find that the decision made by Macleod is fair, and based on objectively verifiable and undisputed facts for the following reasons:
	1. It was agreed that when one is making an acting appointment, one does not follow as stringently or rigorously the procedures as one would do when one is making a permanent substantive appointment. The applicant’s principal complaint against the second respondent was that she only had 3 years of experience, yet she was appointed. While that may be true, Macleod was quite clear and referred to the nature of her work and her track record and expressed his satisfaction that she possessed the requisite level of experience to act in the Post;

* 1. A significant portion of the duties needing to be performed by someone in the Post is industrial relations. It is undisputed that the applicant is not on any of the industrial relations three panels. Nor does he have any significant experience of dealing with industrial relations issues. With him having distinguished himself in his industrial relations studies, it is not clear why he did not make himself available, even if on a voluntary basis, to lend his expertise in this field to any of the panels. Had he done so it is probable that his knowledge and skills would have been noticed and he may have been earmarked for bigger things;
	2. That the Post is a high level management post. While it is clear that the applicant performed certain of Israelson’s duties from time to time, it is undisputed that he has not substantively been given managerial duties to perform at a manager’s level, let alone at senior management level. With him not possessing, through no fault of his own, anywhere near the experience required, it would be unfair, wrong and against the public interest to give the applicant the opportunity to act in the Post. I agree with Macleod that the risks are too high in terms of a possible political and social backlash when things go wrong. After all this is an essential service. In this regard it was agreed at the outset that there was little room for error when making senior appointments, whether acting or not;
	3. Workplace disputes in the public sector often ignore the interest of the public. Such disputes involve – in addition to the interests of the parties – a third dimension, which is whether an appointment or non-appointment will advance the public interest and service delivery. I find that Macleod did take this factor into account in making the difficult decision in this case;
	4. The applicant could have assisted his case by calling an employee, probably his own manager, to show that he did indeed possess skills and abilities that could be usefully employed by the Unit in a managerial capacity. He failed to do that.
1. Even though I propose to dismiss the application it is necessary to say a few words about an issue that arose intermittently during the hearing: that of career-pathing. The applicant testified that he was frustrated and disappointed that after 19 years of service he was not being given an opportunity to serve in a managerial capacity. I respectfully identify with his concerns. From a perusal of the CVs at my disposal, including that of the applicant, it is patent that the respondent is very fortunate to have persons of the calibre of the applicant working for it. No apparent system however has been devised to ensure that they continue to be fulfilled and stimulated in their working environment. One way of doing that would be to give them more challenging tasks, such as management.
2. Macleod acknowledged that were a number of persons with ability and potential who were languishing in their posts because opportunities for advancement were limited for persons who held niche positions. He indicated that the bulk of the opportunities were for persons with mainstream skills such as in civil and mechanical engineering. The applicant for his part simply wanted to demonstrate his skills and abilities. Whether he has the mettle to manage in the hurly-burly of the workplace is not clear because he has not held any substantive management position as yet. But he does indeed have the yearning and an appropriate qualification in the shape of the MBA.
3. With a view to accommodating these concerns, Macleod had devised a new organogram. All I can do is urge the respondent to ensure that it is implemented without delay. That would not only be in the public interest, but stop vital talent, such as that possessed by the applicant, from leaving respondent.
4. In all the circumstances I find that an unfair labour practice was not committed and hence propose to dismiss the application.

# AWARD

1. The application is dismissed.

Dated at DURBAN on this the 13th day of SEPTEMBER 2012.

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R J PURSHOTAM

*Arbitrator*