ARBITRATION AWARD

Panellist/s: **Leslie Martin**
Case No.: **PSHS337-10/11**
Date of Award: **30-Jul-2012**

In the ARBITRATION between:

In the arbitration between:

W. T. Andrews
(Union / Applicant)

and

Department of Health- Western Cape
(Respondent)

DETAILS OF HEARING AND REPRESENTATION

1. The arbitration was held at the offices of the Department of Health in Klipfontein Road Athlone on Wednesday 23 May 2012, 26 June 2012 and 27 June 2012. The applicant, Mr. Winston Trevor Andrews (Andrews), was represented on the first occasion by Advocate P.J Blomkamp and thereafter by Advocate R. Seggie instructed by Mr. L.Cairns. The respondent was represented by Advocate T. Golden instructed by State attorney Ms. C. Bailey.

ISSUE TO BE DECIDED

2. Is the conduct of the respondent in requiring Andrews to vacate the premises conduct as provided for in S186(2)(a) of the Labour Relations Act 65 of 1995 as amended (the LRA)?

BACKGROUND TO THE ISSUE

3.Andrews works for the respondent as an occupational therapy assistant at Alexander Hospital in Maitland. He resides at the old nurses' home and since 1992.

4.Since before 1990 rooms in the old nurses' home were utilized for the purposes of housing personnel.

5.It had at some stage been agreed that a part of the old nurses' home be used as a step down facility for a non governmental organization whereafter the remaining 14 rooms continued to be used for accommodation of personnel(the hospital).

6.The respondent has subsequently indicated that those 14 rooms be earmarked for other purposes.

7.Currently only 2 of these rooms are occupied. Since 2008 the respondent has taken various steps to have Andrews vacate the room. These steps included obtaining an eviction order, which thereafter was set aside by the High Court on the basis *inter alia* that the magistrate Cape Town ought not to have it as the matter involved an issue of whether the respondent's attempt to deprive Andrews of his occupation of the room was the withdrawal of a benefit and that is was therefore the bargaining council that had the jurisdiction to deal with the matter.

8. In terms of Section 138(7) of the Act, I am required to provide brief reasons with my award. Accordingly, I shall only refer to the evidence I consider relevant to determining the dispute between the parties.

SURVEY OF EVIDENCE AND ARGUMENT

9.Each party handed a bundle of documents into evidence. Andrews and Anton Hocher (Hocher) a senior administrative officer at Groote Schuur Hospital, testified under oath for Andrews. Dr. Agata Anna Krajewski (Krajewski), the manager medical services at Groote /schuur Hospital, and Zandre Filby (Filby), the deputy director of support services at the hospital testified under oath for the respondent.

10. It was common cause between the parties that the respondent had alleged at various times that it required the room for various purposes and that there has been ongoing discussion at institutional management and labour caucus meetings (IMLC) regarding the use to which they can or will be put since the late 1990s.

THE EVIDENCE FOR THE APPLICANT:

11. Andrews could not remember any complaints from other staff regarding those staff members receiving inexpensive housing while they did not as an unfair privilege.

12. While he could remember complaints about unruly behavior at the residences he could not remember the kitchen being vandalized.

13. While he could remember a complaint regarding someone having been raped at the residences there was no one who had in fact been raped there.

14. He could remember a proposal to close down the residences for reasons of serious misconduct being tabled at an IMLC meeting in 1996. HOSPERSA was represented at the meeting. Andrews was the representative and he had signed and submitted an objection to the closure of the residence.

15. Andrews was not aware of the head of department's wanting to implement the decision of an IMLC meeting to close the residence.

16. Although there was a consultative process regarding the residences at which Andrews also attended, this consultative process was between management and labour and not Andrews in his personal capacity. He had never been notified personally as a resident of any consultative process. There was a single quarters committee with which Andrews could not recall management consulting.

17. Management were obliged to consult with staff members in their individual capacity and not through their union.

18. While Hospersa agreed to say no new applicants will be allowed to stay, Andrews was not a new applicant. Although this agreement stated that existing residents would stay until alternative accommodation was found there was no time limit to this clause. Andrews had signed the agreement as the union representative.

19. Andrews had no comment on whether or not there had been consultation over 10 years and that he had known that that he had to vacate the premises at some stage.

20. Andrews was told of the meeting between the respondent and the single quarters committee reflected at page 72 of the respondent's bundle. Andrews agreed that further meetings were held between the respondent and the single quarters committee at which the basic issue was that of when residents of the single quarters would vacate and looking at alternative temporary accommodation.

21. During the period that the respondent was trying to recruit nurses by making it attractive through offering accommodation to them Andrews did not refuse to move. He had not moved because he had not been asked to move.

22. He could not say what applied to him if not the 3 months period to stay that was applicable to new applicants.

23. A notice was given to Andrews(page 77). Hospersa however did not sign the agreement.

24. In 2005 Andrews had applied for a housing allowance. The value of the housing allowance was R800.00 which could be used towards the payment of a

bond or rent. The rental for the room currently occupied by Andrews is R850.00 which includes water and electricity.

25. Andrews earns R9,000.00 per month and has 2 adult sons whom he supports. He cannot find alternative accommodation as that is too expensive.

26. The letter at page 21 of the applicant's bundle of documents is from the director of human resources directing that where employees are unable to vacate accommodation the matter must be referred to the Directorate Labour Relations. Andrews' problem was never so referred.

27. Andrews had no comment regarding the respondent's version put to him that the eviction process was also based on the fact that the respondent had revoked the approval he had to occupy the room.

28. Andrews contends therefore that the respondent had unilaterally withdrawn his benefit which comprises the accommodation in the room at the old nurses home and that such withdrawal was procedurally unfair

29. It was procedurally unfair because no proper process preceded the withdrawal of the benefit and because Andrews was not consulted at all. The respondent also ignored its own previous directive at Page 21 of the applicant's bundle. That had laid down that any case of an occupant of a nurses home who could not vacate was to be referred to the directorate of human resources. Andrews case was not so referred and nobody asked him whether he could vacate.

30. Andrews contends further that the withdrawal of the benefit was also substantively unfair because the respondent had no alternative purpose for which it required the room. Had Andrews vacated the room it would most likely have stood empty. There was accordingly no countervailing advantage to the respondent and therefore to withdraw it in those circumstances is substantively unfair.

31. There are numerous buildings around the greater Cape Town area that are under the control of the respondent and that are standing vacant.

THE EVIDENCE FOR THE RESPONDENT:

32. Krajewski was the medical superintendent at the hospital until the beginning of 2006.

33. She had been briefed that part of the singles residences would be used as a step down facility and part as accommodation for 25 staff as agreed between management and labour.

34. It was felt that policies pertaining to the use of the singles residences had to be put in place because of many acts of misconduct that had taken place.

35. The rooms were occupied by staff members who had been there for an extended period of time. This resulted in an inability to provide temporary accommodation for those in need of such accommodation.

36. Some of the staff occupying the residences earned sufficient salary to get accommodation elsewhere. This also caused dissatisfaction from other staff members who were not afforded the same opportunity and who earned less income.
37. The complaint was that of disparity and that the singles residences were occupied by an exclusive group.

38. This pertained to 14 rooms the occupants of which did not appreciate that it was temporary accommodation.

39. Krajewski was never made aware of this arrangement being an employment benefit and neither had she found any documents to such effect.

40. The occupants of the rooms did not make any effort to find alternative accommodation.

41. As the agreement did not stipulate a time frame within which the rooms must be vacated the issue was again placed on the agenda between management and labour.

42. In 2001 therefore an agreement was reached in terms of which a time frame of 3 months was stipulated.

43. Regarding the contention of Andrews that he had not been consulted with, Krajewski testified that the position taken at a meeting between management and labour was that labour would consult with the tenants.

44. Andrews was aware of this as he had signed a lease agreement. (see page 110 of the respondent's bundle).

45. Andrews had also attended at the meetings and had never raised the objection that he should be dealt with personally.

46. The information at the meetings would also go back to the single quarters committee.

47. Krajewski agreed that the hospital secretary should have communicated with Andrews

48. Both Krajewski and Filby agreed that housing was not offered as a benefit when they started to work for the respondent.

49. In terms of the current departmental policy on housing employees were not entitled to housing at all. Instead, a fixed amount of R800.00 is given to all employees to assist with rent or a bond.

ANALYSIS OF EVIDENCE AND ARGUMENT

50. The question of what constitutes a benefit has proven to be a perplexing one in our jurisprudence. There has clearly emerged numerous approaches to the issue

by our Courts. Some of the definitions of what constitutes a benefit have been accepted and rejected and retained and replaced with others.

51. In the dispute before this arbitration Andrews contends that his occupation of the room constitutes a benefit because it is an advantage conferred upon him by the employer which does not originate from a contractual statutory entitlement but rather from an exercise of its discretion by the respondent to do so.

52. On the other hand it is the contention of the respondent that the prevailing view is that of a benefit originating ex contractu or ex lege.

53. The respondent contends that the occupation of the room by Andrews is not a benefit and that even if it were a benefit, the respondent had followed a proper procedure in withdrawing the benefit.

54. It must be noted at the outset that just as an employer is entitled to dismiss an employee provided it does so for a fair reason and follows a fair procedure so too an employer may withdraw a benefit provided it does so for a fair reason and follows a fair procedure.

55. It is clear from the evidence presented at this arbitration that there had been numerous consultations between the respondent and the various trade unions that have members at the hospital.

56. I am of the view that there will be no purpose served through these various meetings with the said trade unions if these unions were not to convey the outcomes thereof to their members. It would therefore be fair to assume that these trade unions had in fact made their members aware of such outcomes.

57. With specific reference to Andrews and the hat that he wears as a member of a trade union I therefore have no doubt that these outcomes had been brought to his attention and therefore that he knew of his having to vacate the room which he occupied.

58. Bolstering this assumption is the fact that Andrews was himself present at most of the meetings at which these outcomes were arrived. And therefore by virtue of his being the trade union representative knew that he had to vacate the room which he occupied.

59. Andrews would or should also have known that any issues he may have had should then have been raised through his trade union at the IMLC meetings.

60. Andrews however contends that the respondent had to consult with him in his personal capacity as an employee and that its failure to do so meant that he had not been properly informed of his having to vacate the room.

61. In this regard I am of the view that as it was the duty of the trade union to represent its members and to convey the outcomes thereof to such members that the respondent had in fact sufficiently consulted with Andrews regarding his having to vacate the room.

62. Further in this regard it is the case of Andrews that the respondent had failed to implement its own internal procedures by failing to refer his inability to vacate the room which he occupied to the respondent's human resources directorate through an internal memorandum to that effect thereby falling foul of the procedural fairness of the withdrawal of his benefit.

63. In this regard I am of the view that one must in fact look at whether or not Andrews really was unable to find alternative accommodation.

64. The evidence before me is of many employees of the respondent, earning less than does Andrews, having to secure accommodation themselves while enjoying a housing benefit in the form of an allowance in the amount of R800.00 per month as does Andrews. Many of these employees have voiced their dissatisfaction with the fact that Andrews enjoys the privilege that he does while they do not. These employees consider this unfair and I agree with that. His advantage is clearly to the effect that he would be getting 2 housing benefits if his occupation of the room were in fact a benefit.

65. While it is clear from the testimony of Andrews that his is a situation of difficulty I am not persuaded that he has proved that he is unable to find alternative accommodation. I concede that Andrews' circumstances could potentially render his finding alternative accommodation difficult his circumstance will be no worse than many other employees of the respondent and in many cases even better.

66. I am therefore of the view that there was no need for the respondent to refer Andrews' case to its directorate human resources as there is insufficient evidence from which to conclude that Andrews was unable to find alternative accommodation.

67. The evidence suggests rather that Andrews is unwilling rather than unable to find alternative accommodation.

68. Significant in this regard is the fact that Andrews is paying R850,00 for the occupancy of the room which includes water and electricity.

69. It is clear that Andrews is using the R800.00 housing allowance and that he is paying an additional R50.00 over and above such housing allowance.

70. In these circumstances it is more likely that Andrews had accepted the R800.00 housing allowance as a consequence of its being the prevailing benefit to all the employees of the respondent and that the approval of his occupancy under the regime that gave rise to it in the first place had indeed been revoked by the respondent.

71. In fact the internal directive suggests that it is Andrews who must cause his case to be referred to the respondent's directorate human resources. It is after all he who knows his circumstances best and whether there exists an inability on his part to find alternative accommodation. Andrews himself had testified that no one knows his personal circumstances.

72. As stated above this process he ought to have initiated through his trade union at the various IMLC meetings.

73. In conclusion and in so far as the procedural fairness of the respondent's withdrawal of Andrews' accommodation is concerned I am satisfied that the respondent had followed a fair procedure in so doing.

74. Andrews argues that the respondent's depriving him of his occupation of the room constitutes a substantively unfair labour practice in that it had deprived him of a benefit in doing so in circumstances where there existed no countervailing advantage to it. The lack of such advantage Andrews argues, lies in its not putting the residences to any use after the ejection of the tenants in the other rooms and more particularly, that it would not put his room to any use after he vacates it.

75. There is however sufficient evidence through the testimony of Krajewski and Filby indicating that the respondent had earmarked the residences for other purposes. These include providing accommodation for new recruits in order to make it attractive for such recruits to join the nursing profession which was in a crisis and parents visiting special patients from afar needing overnight accommodation. The respondent also wanted to provide accommodation for staff who were in difficulty at their homes e.g. being abused.

76. In order to achieve these objectives the respondent had to ensure that there was in place a process for vacating the rooms.

77. It is clear from the evidence of the purposes for which the respondent had planned these rooms to be used that its specific operational requirements would best be met by executing such at this particular premises.

78. This in fact constitutes sufficient countervailing advantage that the respondent derives from its revoking Andrews' occupancy of the room. There is accordingly sufficient reason for the respondent to have evicted Andrews upon his refusing to vacate the room voluntarily after his occupancy had been revoked.

79. The further significance of the respondent having revoked its approval of Andrews' occupancy of the room is that if, as Andrews contends, it was a benefit then his dispute would have arisen long before the issue of his eviction had.

80. It is clear from the testimony of Andrews himself that he had been given the accommodation at a nominal rental primarily as a consequence of the extra work that he was doing whilst holding the position of a security guard.

81. It could therefore be said that Andrews' occupation of the room was a remuneration in kind for the work that he had done.

82. In my view the respondent had given Andrews a quid pro quo for work that he had delivered. This clearly constitutes payment for work done as found in the definition of an employee. The arrangement had clearly not come about specifically as a consequence of the fact that there existed a relationship of employment but rather more specifically as a consequence of reward for work done within the context of an employment relationship.

83. Had the respondent not remunerated Andrews for the work done in these circumstances Andrews could well have had a claim against the respondent for work thus done. The approval of Andrews occupancy of the room therefore cannot be said to have been purely at the discretion of the respondent.

84. In fact that dispensation arose between the parties when Andrews was a security guard and a helpful one at that.

85. He has since clearly progressed from that position to the one he currently holds resulting probably in the reason for his acquiring the accommodation having fallen away.

86. A central issue in this matter is whether or not the respondent ought to have consulted with Andrews and whether it in fact did so or not.

87. Andrews contention is clearly that although his trade union, which he had represented in some of the meetings had been consulted with, the respondent had not consulted with him personally.

88. The respondent contends on the other hand that it had sufficiently consulted with Andrews as it had consulted with the trade unions including his trade union.

89. I do however find myself in disagreement with the contention of Andrews that his occupancy of the room at the outset was in fact a benefit. I find further that if it were indeed a benefit it had thereafter been revoked by the respondent after proper and sufficient consultation had taken place. I find that Andrews had accepted the fact that the approval of his occupancy of the room had been revoked and that he had accordingly accepted through his application therefore in 2005 the housing allowance as the existing housing benefit conferred by the respondent on all its employees. I find that Andrews had done so as he had no alternative, the majority of the respondent's employees having accepted it. These employees in fact objected to the fact that Andrews was enjoying the privilege that he had while they had no such privilege. On democratic principles Andrews would be hard-pressed not to have accepted the benefit of the housing allowance as it applies to the majority of the respondent's employees his being an individual.

90. I do however have my doubts that it would have remained a benefit and more specifically at the time that Andrews was served his eviction notice.

91. Finally I must deal with the contentions of the applicant representative made at the arbitration itself. He has alluded thereto in his closing argument without actually dealing with it.

92. The applicant representative has referred to rulings made by the arbitrator more specifically that the arbitrator allowed Andrews to testify on what essentially was a question of law and secondly that the arbitrator allowed questions to Trajewski from the respondent representative and answers from her in breach of the parol evidence rule.

93. While I do not consider it necessary to go into the merits thereof I am of the view that it suffices to say that in neither case was the applicant prejudiced thereby. In fact it was pointed out to the representative of the applicant that in both instances

the answers given will be considered, if necessary, in a manner which would ensure that it would not be prejudicial to the applicant.

94. The stance of the arbitrator is that it is prudent to hear the evidence and then to deal with it in the arbitration award in such a manner as to ensure that the party who potentially can be prejudiced thereby is in fact then not so prejudiced.

95. Having thus considered all the evidence presented at this arbitration I find that the conduct of the respondent in evicting Andrews from the room does not constitute an unfair labour practice in the form of denying him a benefit as contemplated in S186(2)(a) of the Labour Relations Act 66 of 1995 as amended.

AWARD

96. This application for relief in terms of the provisions of the Labour relations Act 66 of 1995 as amended is dismissed.

COMMISSIONER: L. MARTIN

Panellist/s: **Leslie Martin**
Sector: