FILE NO. AA93-10-011

EMPLOYER: P & H Foods

UNION: United Food and Commercial Workers Union, Local 832

ARBITRATOR: Dr. B. Schwartz

APPEARANCES: J. Jardine, for the Employer
R. Ziegler, for the Union

GRIEVOR: D. Swan

DECISION RENDERED: October 29, 1993

EXPEDITED ARBITRATION: Yes

ISSUES: DISABILITY - Sick leave - entitlement; COLLECTIVE AGREEMENT - Interpretation; TESTS - Reasonable foreseeability; INTERPRETATION - Words and phrases ("own misconduct" "non-compensable" "reasonable foreseeability test"): During an argument with an fellow employee involving personal matters, the Grievor was pushed against a tank and injured her back. She filed for Workers' Compensation Benefits. Her claim was denied, because the injury was not work related. She then requested sick leave. The Employer denied her request because the injury was a result of her "own act or misconduct" and was a "non-compensable accident" under Article A-2.05 of the collective agreement. It added the Grievor was aware from another incident involving the other employee that he might resort to violence when frustrated and she should have walked away from him. It argued that instead of receiving sick leave payments, she should be suing her fellow employee. As a result, the Union filed a grievance claiming that the denial of sick leave payments was unreasonable.

AWARD: GRIEVANCE ALLOWED. The Arbitrator found the Grievor's conduct was consistently reasonable given that she was confronted, without provocation or warning, with some highly personal and offensive remarks. He believed she acting reasonably in defending her dignity and reputation. He also found that she tried to return to her work station and she did not have any reasonable alternative route as other routes had restricted entry. The Arbitrator found that the "reasonable foreseeability" test, as suggested by the Employer, was too strict a test. Even if the Grievor was aware of all the details of the previous incident referred to by the Employer, she could not reasonably have expected the other employee to use force against her as she had no previous encounters of that sort with him. In the other instance, the employee was defending himself from attack of another employee and he was not disciplined for that incident while his attacker was suspended. In interpreting "own act" in Article A-2.05, the Arbitrator found the Employer must adopt an interpretation that avoids arbitrary and unfair results. Because he found the Grievor acted in a reasonable manner, then her "own act" should not deny her sick leave as her actions were reasonable. He also found that "non-compensable" meant not covered by Workers' Compensation. However, the Grievor was not seeking double recovery and it was reasonable for her to pursue her sick leave claim rather than try to launch a tort suit given the uncertainty that the other employee would be able to pay a judgment and a sick leave claim should be reasonably quick and inexpensive way of obtaining compensation. Therefore, he ruled that the Grievor was entitled to receive sick leave payments.

93-10-011

Award

P & H Foods

and

United Food & Commercial Workers Union, Local No. 832

Re: Darlene Swan
Denial of Sick Benefits
Case No. 674/93/LRA

Date of Hearing: Sept 15, 1993; October 13, 1993.
Place of Hearing: Place Louis Riel, Winnipeg; Place Louis Riel, Winnipeg
Union representative: Mr. Robert Ziegler;
Counsel for employer: Ms. Janet Jardine
Arbitrator: Dr. Bryan Schwartz
Award issued: 29 October 1993

Introduction

The grievor was injured in an altercation with a fellow employee. She is seeking sick leave for time off as a result of her injury.

The employer says that the Ms. Swan is not entitled to sick leave for two reasons. First, it says that the injury is the result of her "own act or misconduct". Ms. Swan, argues the employer, freely chose to involve herself in the argument that led to her being pushed and injured by her colleague. Secondly, the employer argues that instead of receiving sick leave payments, Ms. Swan should be suing her fellow employee.

Preliminary Objections

Both sides agreed that I was properly appointed. The employer accepted that I had jurisdiction, subject to several preliminary objections. The employer contended that union had missed some time deadlines and other procedural requirements in pursuing its grievance.

The employer's counsel asked if, after hearing evidence on the preliminary point, I would be able to rule on it immediately. That way, both sides might be spared the trouble and expense of a hearing on the substance of the dispute. I replied that I probably would have to reserve judgment on the preliminary objections, and hear the merits of the case. It was clear that there would be a dispute over both the facts and law, which I would probably need time to consider.

The union's representative denied that there were any procedural irregularities with the grievance. Even if there were, he said, they were of a technical nature that caused no prejudice to the employer. Accordingly, even if I found any flaws on the union's side, the union would be asking me to waive them. Section 121(2)(e) of the Labour Relations Act. (Judging from the documents alone, it is indeed very likely I would eventually have absolved the union from any procedural irregularities).

After a short recess, the employer's counsel stated that in the interests of expediting matters, she would withdraw her preliminary objections.

Ms. Swan's testimony.

The grievor herself testified, and I found her to be an entirely credible witness. She appeared to answer questions in an honest and uncalculating way. My impression was that she made no attempt to shape her answers to advance her legal case; she was

simply responding in a factual way to whatever was asked her. When she did not know an answer, she admitted as much readily.

Her testimony was as follows. During a break, she emerged from the women's washroom. Standing outside were several co-workers, including the person who eventually shoved her, Mr. Richard Vincent.

Mr. Vincent immediately called her an "unfit mother". Ms. Swan responded that Mr. Vincent should mind his own business. Mr. Vincent then made some insulting allegations about Ms. Swan's relationship with her male roommate. Ms. Swan told Mr. Vincent that he had no right to make such accusations. "You don't know the story", she said. The two continued to argue as Ms. Swan walked towards her work site. She was walking "a tiny bit" ahead of him. She did not want to be late. Ms. Swan testified that she was simply trying to get back to work. Referring to the time just before the push, Ms. Swan testified she wanted "nothing to do with him anymore." According to Ms. Swan, she was not shouting or making any threatening hand gestures towards Mr. Vincent.

Mr. Vincent then pushed Ms. Swan and she fell against a tank. Mr. Vincent drew his fist back to punch Ms. Swan, but was restrained by another co-worker, Mr. Randy Sinclair.

Ms. Swan informed her foreman, Mr. Randy Ross, what had happened. She was called down to the office of Mr. Frank Doerksen, She then returned to her work station, where she finished her shift.

The next morning, Ms. Swan was troubled by a very sore back. She tried to work for a few hours, but could not continue. She was unable to work the next day, and saw a doctor. She obtained a note from him certifying that she was unable to work. Mr. Doerksen advised her to filed for Workers Compensation. She did so, but was eventually told that the injury was not "work related". She informed Mr. Doerksen's office of the denial and requested sick leave pay. He undertook to provide her with an answer. The eventual response, according to Ms. Swan, was a "no". She was advised to bring a civil action against Mr. Vincent.

Ms. Swan testified that she considered Mr. Vincent a "friend" prior to the incident. She had not, prior to the incident, considered Mr. Vincent to be a "violent" person. She had heard that he was involved in some sort of confrontation with another employee, Mr. John Leskowitz, which had resulted in Mr. Leskowitz' being suspended. She did not have detailed information about that other incident.

I fully accept Ms. Swan's testimony on all the points just canvassed.

Mr. Ross' Testimony

Mr. Randy Ross also testified on behalf of the union. He was the co-worker who had restrained Mr. Vincent when he readied himself to punch Ms. Swan.

Mr. Ross provided the surrounding context for the altercation involving Ms. Swan and Ms. Vincent. Before Ms. Swan emerged from the washroom, Mr. Vincent was already accusing one co-worker of being an unfit mother. When Ms. Swan came out of the washroom, he referred to Ms. Swan as "another unfit mother".

Mr. Ross confirmed the following facts:

-Ms. Swan told Mr. Vincent to mind his own business;
-Mr. Vincent then made further insulting remarks about her personal life;
-Ms. Swan may have raised her voice somewhat, but was not shouting;
-Ms. Swan started to walk towards her work station;
-While doing so, Ms. Swan continued to exchange words with Mr. Vincent;
-Ms. Swan did not make any threatening gestures towards Mr. Vincent;
-Mr. Vincent pushed her into the tank;
-Mr. Ross restrained him from punching her.

Mr. Ross added that after pushing Ms. Swan, Mr. Vincent approached another employee and pushed her as well. Mr. Ross again had to physically restrain Mr. Vincent.

Both Ms. Swan and Mr. Vincent recalled that initially, Ms. Swan and Mr. Vincent were in the company of other workers, but by the time of the push, Ms. Swan and Mr. Vincent were walking ahead of the others. Mr. Ross recalls them walking "side by side". I do not find his testimony to be significantly inconsistent with Ms. Swan's in this respect. Given that she was walking only "a tiny bit" ahead of Mr. Vincent, it is easy to understand that Mr. Ross would perceive, recall or describe them as walking "side by side". In any event,my decision in this case would be the same even if Ms. Swan was walking immediately next to Mr. Vincent.

Testimony presented by employer

Mr. Frank Doerksen testified on behalf of the employer. He explained the management perspective on the incident. First, he felt that Ms. Swan was injured as a result of her own misconduct. He felt that the altercation between Mr. Vincent and John gave Ms. Swan reasonable notice that Mr. Vincent might resort to violence when frustrated. Mr. Doerksen suggested that knowledge of the event would be widespread in the plant. In Mr. Doerksen's view, Ms. Swan had "ample opportunity" to walk away from Mr. Vincent. From past

experience, he felt she was a "go-getter" who would not "back down" from an argument. On this particular occasion, felt Mr. Vincent, she should at least have moved away.

Mr. Doerksen recalled an earlier incident in which an employee had, due to misconduct, been denied sick leave pay. The employee had tried to punch someone and put his fist through a window. The union first grieved, then dropped the matter.

On a number of previous occasions, testified Mr. Doerksen, Ms. Swan had successfully applied for compensation from Autopac or Workers Compensation, rather than obtaining sick leave pay.

Mr. Doerksen further testified that in the view of senior management, in this case Mr. Swan's appropriate remedy was not sick leave pay, but a tort action against Mr. Vincent.

(The testimony of Mr. Doerksen and Ms. Swan were directly contradictory in one respect. They disagreed about how many conversations they had about her sick leave claim. Ms. Swan recalled more of them. Mr. Doerksen has to concern himself with many employee problems, Ms. Swan only with her own, so perhaps her memory is more complete with respect to her own case. In any event, the result here would be the same regardless of whose memory is sharper on this point,)

I have no doubt at all that Mr. Doerksen, like Ms. Swan, presented his perspective in an honest and forthright manner. The basic dispute with Ms. Swan is not over fact, but opinion: in the circumstances, should she blamed for not taking more active steps to disengage herself from Mr. Vincent?

Was Ms. Swan's injury partly the result of her own misconduct or unreasonable behaviour?

At the hearing, the employer took the position that Ms. Swan was partly the author of her own misfortune. Ms. Jardine, on behalf of the employer, did a very thorough and capable job of exploring the ways in which Ms. Swan might be faulted for her participation int he incident. I have reflected carefully on the employer's evidence and argument in this respect. In the end, my conclusion is that Ms. Swan's conduct was consistently reasonable.

Mr. Vincent initiated the verbal exchange with Ms. Swan. He made insulting personal remarks in the presence of other co-workers. I believe it was reasonable for her to defend her dignity and reputation. Even if there is no one else present, an employee can reasonably attempt to defend herself verbally from insults.

I would not have blamed Ms. Swan if responses had been more extensive or heated. In the actual event, Ms. Swan's replies were sensible and restrained. She repeatedly told Mr. Vincent that he

did not know the facts and should mind his own business.

Ms. Swan tried to walk back towards her work station. She did not want to continue the exchange. She did not have any reasonable alternative to the route she took. The employer had instructed her to take that route. Employees had been instructed not to take other routes, which might result in the contamination of clean areas of the work site.

Ms. Swan could not reasonably be expected to reverse course and walk away from the work site, while Mr. Vincent proceeded towards it. According to Ms. Swan's testimony, which I accept, Mr. Vincent was right behind her, and therefore blocking that route. Furthermore, Ms. Swan did not want to be late in arriving at her work station.

Even if Ms. Swan and Mr. Vincent had been walking side-by-side, she could not reasonably be faulted for walking back towards to the washroom area. She might have ended up late for work. Or Mr. Vincent might have followed her.

If Ms. Swan had simply stopped, Mr. Vincent might have stopped too. Or she might have ended up late in arriving back at the work site.

Ms. Swan did not try to sprint ahead of Mr. Vincent. There was no testimony about whether she was physically able to do so, or could have done so safely. Perhaps, in the rush of events, the option did not occur to her. Maybe she did think about it, but decided that running away would be undignified. The evidence suggests that trying to run might have been futile; the agitated and aggressive Mr. Vincent might have simply raced after her. On one telling point, Ms. Swan's testimony is clear and explicit: she saw no urgent need to physically escape from Mr. Vincent because she did not expect him to assault her.

In my view, Ms. Swan could not reasonably have expected that Mr. Vincent would suddenly resort to violence. She had no previous encounters of that sort with him. She had heard that he was involved in a confrontation with Mr. John Leskowitz. But she knew few details. Her understanding (which was correct) was that Mr. Vincent was not disciplined as a result of the incident, and that it was Mr. Leskowitz who was suspended.

I think Ms. Swan handled herself well under difficult circumstances. Indeed, she could not have been faulted if she had conducted herself with somewhat less restraint: e.g, if she had used harsher language in responding to Mr. Vincent. She was suddenly confronted, without provocation or warning, with some highly personal and offensive remarks. She had to make very fast decisions on how to respond. Those of us evaluating her conduct

have the benefit of hindsight and time for reflection; she did not.

A comment on Mr. Vincent's earlier altercation with Mr. Leskowitz.

Mr. Doerksen believed that information about the altercation between Mr. Vincent and John would be "public knowledge" at the plant. Ms. Swan and Mr. Ross both testified that they in fact knew little about the details. I have accepted their testimony about the extent of their own personal knowledge. In any event, even if Ms. Swan had known the complete details, I would still conclude that Ms. Swan had no reason to anticipate violence from Mr. Vincent.

According to Mr. Doerksen's testimony, here is what happened between Mr. Vincent and Mr. Leskowitz. While the two were working on the same shift, Mr. Vincent reached for a piece of equipment. Mr. Leskowitz tried to shove him away. Mr. Vincent pushed back. Mr. Leskowitz then started beating Mr. Vincent with a stick. Mr. Vincent did not initiate the use of force; he was responding to it. In the aftermath of that incident, the employer disciplined only Mr. Leskowitz.

Even if Ms. Swan had known all the details of the Vincent/Leskowitz encounter, she could not reasonably have expected Mr. Vincent to use force against her. Unlike Mr. Leskowitz, she did not attack Mr. Vincent, or in any way threaten him physically. She was simply telling him, in response to unprovoked insults, to mind his own business.

When does an employee's own "act" disqualify them from receiving sick leave pay?

Article A-2.05 of the Collective Agreement provides for sick leave payments. It states that:

> Payments shall not be made when the employees are absent from work because of disability due to sickness or injury caused by or as a result of the employee's own act or misconduct.

This sentence could not possibly mean that an employee is disqualified merely because his or her own action was one of the factors that made an injury possible. Suppose an employee, while driving in a lawful and proper manner, is injured by another motorist. It would be unreasonable if the employee's "own act" of driving disqualified her from sick leave pay.

Counsel for the employer suggested that the key test is "reasonable foreseeability". If the employer can see injury as a possible consequence of her actions, then she can be denied sick leave. I suspect that the "reasonable foreseeability" test is too strict. It would deny sick leave pay to an employee who has done

something that contains some signifigant risk, but which is still reasonable, or even admirable. (For example, look at the case of Mr. Randy Sinclair. He twice physically restrained Mr. Vincent from striking a fellow employee. Mr. Sinclair was obviously taking something of a risk himself. Yet his conduct was praiseworthy. What if Mr. Sinclair had been injured? Mr. Sinclair's "own act" would not, in my view, have disqualified him from sick leave pay).

Let me assume for the moment, though, that the "reasonable foreseeability" test is correct. After extensively reviewing the evidence, I am convinced that Ms. Swan did not expect Mr. Vincent to resort to force. Furthermore, Ms. Swan's failure to anticipate violence was entirely reasonable.

As I say, I doubt that the "reasonable foreseeability" test is the best one. Section 80 of the Labour Relations Act requires that Collective Agreements be administered "fairly, reasonably and in good faith". In interpreting "own act" in Article A-2.05, the employer must adopt an interpretation that avoids arbitrary and unfair results. An employee's "own act" should not deny her sick leave pay if, all things considered, it was reasonable. After considering all the evidence and arguments, I am convinced that Ms. Swan did indeed act in a reasonable manner. She was an innocent victim, not the co-author of her misfortune.

The past practice of the parties can be a factor in interpreting a collective agreement. There are a few cases where this employer has denied sick pay under the "own act or misconduct" theory. Each of these cases involved conduct in which the employee appeared to be careless about his own safety. In one case, an employee was injured when, while drunk, he fell off a truck. The employer refused to pay, and the union dropped its grievance over that refusal. Much the same happened when an employee injured himself while trying to throw a punch.

Is Ms. Swan disqualified because the injury was a "non-compensable accident" under Article A-2.05?

Counsel for the employer suggested that Ms. Swan was disqualified from sick leave pay because her injury was the result of a "non-compensable" accident.

I think the key to understanding "non-compensable" in Article A-2.05 is to read the previous paragraph, A-2.04:

> In case any sickness or non-compensable accident benefit payment, lesser in amount or duration than those payable under this subsection are provided for by provincial or federal laws, it is understood that the difference only, if any, between such provincial or federal required payments and the amount the employee is entitled to under this sickness or non-compensable accident payment plan will be available. If such

provincial or federal payments are greater than those payable under this subsection, no payments shall be made under this subsection.

Both sides agreed that Article 2-.04 only applies to benefit schemes that are established and funded by federal or provincial statutes. It does not apply where the employee's recourse is a lawsuit. I agree with the parties, for the following reasons:

-the paragraph refers to "benefit payments" and "payment plan". Those phrases sound to me like entitlements under a statutory scheme, like Autopac, not to damages recover in a civil action.

-the paragraph refers to "federal or provincial laws". Again, that sounds like statutes. If the idea was to include tort claims, which are primarily the creation of common law (not statutes), the appropriate phrase would be "payable under federal or provincial law", or even more simply, "payable by law".

On previous occasions, Ms. Swan had in fact applied for and received payments from Autopac or Workers Compensation, and refrained from pressing any claim against the employer. In this case, at the suggestion of the employer, she did try to obtain compensation from Workers Compensation before pressing her sick leave claim.

The employer argued that a "compensable" accident is one that is covered by a statutory scheme. Ms. Swan had a tort remedy only, says the employer, so her injury was not "compensable."

With respect, I believe the employer's position would lead to unreasonable results. Consider two employees, S and T. They both miss work due to accidents. S has a valid statutory claim (under, say, Autopac) and T only has a tort claim.

What happens to S? She will be fully compensated for her lost days of work. Perhaps the statutory scheme will compensate her for her entirely for her lost days of work. If not, the employer must make up the difference.

But look what happens to T under the employer's theory. T is entirely disqualified by Article A-2.05. If T sues a defendant who can only pay part of the judgment, T will end up largely uncompensated for her lost days of work. On the employer's theory, the employer is under no obligation to make up the difference. And if T sues a defendant who cannot pay the judgment at all? On the employer's theory, T ends up entirely uncompensated for her lost days of work.

The union proposed an alternate interpretation of A-2.05. An

experienced shop steward testified that she had not always understood "non-compensable" to refer to an accident that is not covered by Workers Compensation. In several arbitral awards submitted by the union representative, Mr. Ziegler, "non-compensable" is by the adjudicator in the same sense: not covered by Workers Compensation.

I agree that "non-compensable" means "not covered by Workers Compensation".

In reaching that conclusion, the crucial consideration for me is simply this: equating "non-compensable" with "not covered by Workers Compensation" makes sense of the Collective Agreement. It was reasonable for the parties to single out Workers Compensation for special treatment. It is a scheme that is partly funded by employers, and which is supposed to fully or largely compensate the employee for injuries sustained on the job. The parties could reasonably have intended that a worker with recourse to Workers Compensation must rely entirely on that route. In cases where the employee obtains partial compensation under a statutory scheme like Autopac, the parties intended that the employer would make a "top up" payment. Suppose that an employee would ordinarily receive $100 for a sick day, and Autopac pays $80. Under Article A-2.05, the employer would make up the difference of $20.

Let me now turn to the specific facts of this case. This is not a situation where an employee is seeking double recovery. Ms. Swan is not someone who has won a tort suit, been fully compensated for lost days of work, and is now seeking sick leave pay from the employer. I am sure that a labour arbitrator would find a way to prevent an employee from recovering twice for the same lost days of work.

It is possible to imagine cases where the employee might have some responsibility to co-operate with the employer in bringing a lawsuit. Suppose an employer makes the following offer to an injured employee: "we'll pay you your sick leave pay now, but we want you to sue the person who injured you. We will provide a lawyer, and pay the fees. If you win, you will have to pay us back your sick leave pay." In such circumstances, perhaps the employee would have to co-operate, or else forfeit her claim to sick leave pay.

What happened here is that the employer suggested that Ms. Swan try Autopac. She did. and Autopac turned her down. The employer then suggested that Ms. Swan's only remedy was a lawsuit against Mr. Vincent. Ms. Swan testified that she had no money for a lawyer, she was not aware of contingency fees, and she did not expect Mr. Vincent would be able to pay a judgment anyway. Counsel for the employer suggest that Ms. Swan could have tried to find a lawyer prepared to work on a contingency fee basis, and that Mr. Vincent might have had personal liability insurance. But both these

suggestions were speculative. There was no positive evidence to support them. In my view, it was reasonable for Ms. Swan to pursue her sick leave claim against her own employer, rather than try to launch a tort suit. She was, after all, injured at work, and a sick leave claim should be a reasonably quick and inexpensive way of obtaining compensation.

Conclusion

In accordance with the analysis just presented, I would sustain Ms. Swan's grievance, and direct the employer to provide her with the sick leave payment that would ordinarily be available.

Both parties made the following request: if I ruled in favour of Ms. Swan, I should initially leave it to the parties to work out the exact amount of compensation, but retain jurisdiction to settle matters if the parties could not agree. Accordingly, I would expressly retain jurisdiction for that purpose.

I would also retain jurisdiction with respect to any other matters arising out of the interpretation or implementation of this award.

Both parties presented their cases in a concise and able manner, and I thank both Mr. Ziegler and Ms. Jardine for their courtesy and co-operation throughout.

Bryan Schwartz
29 October 1993