

IN THE MATTER OF THE ONTARIO *LABOUR RELATIONS ACT, 1995*

-and-

IN THE MATTER OF AN ARBITRATION

BETWEEN:

PAVACO PLASTICS INC.

- the Employer

-and-

WORKERS UNITED ONTARIO COUNCIL

- the Union

AND IN THE MATTER of the grievance of Shawn Clarke

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

Ian S. Campbell	- Counsel
Jerry Jean	- Director of Operations
Craig Hunter	- Plant Manager
Cathy Comeau	- Supervisor

On behalf of the Union:

Andrea Bowker	- Counsel
B. J. Cardy	- Union Representative
Chris Hasselman	- President, Local 2508
Heather Rankin	- Vice President, Local 2508
Shawn Clarke	- Grievor

Hearing held October 29 and November 26, 2010, in Guelph, Ontario.

AWARD

INTRODUCTION

This is a discipline grievance where the grievor received a one day suspension for throwing a trim knife at his supervisor. The Union denied that the grievor had engaged in any such behaviour.

THE EVIDENCE

Pavaco Plastics Inc., the Employer, makes auto parts in Guelph. The employees are represented by the Workers United Ontario Council, the Union.

Shawn Clarke, the grievor, has been employed at this plant for over 17 years. October 2009 the grievor was suspended for throwing a trim knife at his supervisor - he denied throwing anything at his supervisor. The suspension was grieved. August 2010, the grievor was dismissed from his employment. The dismissal was also grieved and I was appointed as arbitrator under Section 49 of the *Labour Relations Act* to hear the dismissal grievance. At the hearing the parties advised that they wished to arbitrate the October 2009 suspension grievance first and this award deals only with the suspension grievance.

The evidence at this hearing was devoted to the question of whether the grievor threw a trim knife at his supervisor. Four persons testified and they gave conflicting accounts of the events that day.

As part of the evidence I was provided with several pictures of the area of the incident and much of the oral evidence described events and locations with reference to those pictures.

The reset button for the machine operated by the grievor was in an electrical box which was, in turn, attached to a post near where the grievor worked. It was common for employees to put the trim knife they used in their work on the reset button when it was not being used. The trim knife involved here had a retractable hook-shaped blade and was used to trim excess plastic from the parts. The electrical box was small and the top where the knife was stored was estimated as being perhaps three inches by four or five inches in size. The witnesses all used the term reset button to describe where the knife was routinely stored.

This is a noisy plant due to the operation of machinery. I note that employees are required to wear ear protection.

Cathy Comeau's evidence

Cathy Comeau has been the supervisor on the afternoon shift for five years and the grievor has worked on that shift during this time. There were about 15 employees on the afternoon shift. Asked about her relationship with the grievor, she said that she did not consider it bad. She had disciplined the grievor prior to this incident.

October 27, 2009, Ms Comeau said she was advised by Chris Hasselman, President of the Local, that there was a get-well card for another employee at the Vacuum Forming 2 work centre and, if Ms Comeau wanted to sign the card, that was where she would find it.

Ms Comeau said she walked to that area and there was a small bag on the work centre table. She said she picked up the bag and the grievor yelled at her to put it down. She said the grievor was at a cutting table and he walked from that table to a spot about 6 feet away from her. Ms Comeau said that the grievor said "put that down" in an angry tone. She responded "excuse me." The grievor yelled again "put that bag down." Ms

Comeau said she dropped the bag on the work centre table. She testified that the grievor turned his back to her. She said he had a trim knife in his hand, the knife was open, and the grievor threw the knife over his shoulder and the knife landed on the floor two feet in front of her. She said the grievor turned, walked over and picked up the knife. Ms Comeau testified that she said “Shawn, don’t you ever throw a knife again.” She said the grievor did not respond, just turned and walked away toward his work.

After the grievor returned to his work, Ms Comeau said that she was shaken and upset, as she had never had a knife thrown at her. She said she walked back to where Mr. Hasselman was working and advised him what the grievor had done, that he had “fired” a knife and that the next time the grievor did that she would “fire his ass.” She said that Mr. Hasselman did not respond.

Ms Comeau said she left and went to the supervisor’s office and typed up her notes. Those notes were put in evidence and are generally consistent with her testimony, but briefer. The one difference is this - the notes record that the grievor “threw the knife up in the air over his head and behind him in my direction,” rather than over his shoulder.

Ms Comeau said that she then spoke to three employees in that area and asked them if they had seen the grievor throw the knife. None of them had seen a knife thrown although two of them, including Servet Kulafowski who also testified, said they had seen the grievor pick up a knife from the floor, but not throw it.

October 29 Ms Comeau suspended the grievor for the October 30 shift. She said that the suspension was due to the severity of the incident, that throwing a knife violates the health and safety standards, and that throwing the knife at her was insubordination.

In cross examination Ms Comeau said that Mr. Hasselman had said the card was in a bag and that when she arrived at the work centre there was only one bag. She agreed that she did not know whose bag it was. She agreed that she was wearing ear plugs and that if she wanted to be heard from a distance of six feet she would have had to raise her voice.

Ms Comeau said that the grievor sounded angry, not simply loud. Ms Comeau said that after she put the bag down the grievor turned around, took the knife in his left hand and threw it over his shoulder. She said she did not know if the grievor was left handed, nor did she know if he was ambidextrous. Ms Comeau said that the knife landed two feet in front of her. While she saw it hit the floor, she could not recall whether it bounced or skidded when it landed.

Ms Comeau agreed that it was not unusual for operators such as the grievor to put the knife on the reset button on a post in that area. It was suggested to Ms Comeau that the grievor put the knife on the reset button, that it fell off and skidded along the floor toward her. Ms Comeau said that was not possible.

Ms Comeau was advised that the grievor recalled that after the knife fell off the reset button and on the floor he went to retrieve it and saw Ms Comeau's back. Ms Comeau disagreed.

Ms Comeau said that she was not upset by the grievor yelling at her to put the bag down. She said that she was not sure whether the grievor heard her tell him "don't you ever throw a knife again."

It was indicated to Ms Comeau that Mr. Hasselman would testify that she had not told Mr. Hasselman about the knife throwing. She said that was not possible. She reiterated

that she had told him that Shawn had thrown a knife and that if he did it again she would “fire his ass.” She said that Mr. Hasselman had said nothing in response, he had simply turned and resumed work.

Ms Comeau said she spoke to the other employees the same day. She said it was not possible that it was a day or two later. She said her testimony was 100% correct.

Ms Comeau agreed that she had asked Ms Kulafofski if she had seen “Shawn throw a knife” and that Ms Kulafofski had replied that she had seen him pick up a knife from the floor, but did not see him throw one. Ms Comeau agreed that she had not asked Ms Kulafofski if she had seen how the knife got on the floor.

Ms Comeau said that she had also spoken to Jack Robinson, another employee working in that area, and asked him if he had seen the grievor throw a knife. Mr. Robinson said he saw the grievor pick up a knife but did not see him throw it. Ms Comeau agreed that she had not asked Mr. Robinson if he had seen how the knife got on the floor. Mr. Robinson did not testify at the hearing.

Ms Comeau was asked about her notes which indicate the knife was thrown up in the air over the head. She said that she was unable to say whether the knife was thrown over the head or over the shoulder.

Chris Hasselman’s evidence

Chris Hasselman has been employed by the Employer for some 17 years and has been president of the Local Union for 6 or 7 years. He worked on the afternoon shift with the grievor and Ms Comeau.

Mr. Hasselman agreed that he had told Ms Comeau about the card. He said he did not know the card was in a bag and did not tell Ms Comeau it was in a bag, nor where to find it, just that the grievor was in charge of obtaining signatures. He said he was not sure that he even knew where the grievor was working that shift.

Mr. Hasselman said Ms Comeau left and came back 5 to 15 minutes later. Mr. Hasselman said that Ms Comeau told him that if the grievor “ever did that again to her she would fire him.” Mr. Hasselman said that he tried to find out what had happened, that Ms Comeau was frantic and looked upset. He said that Ms Comeau told him she had gone to sign the card and the grievor did not want her to go into his bag and did not want her to sign the card. Mr. Hasselman said that he indicated an employee cannot be fired for being disgruntled, or for not wanting Ms Comeau to go into his bag, and that the idea was ridiculous. Mr. Hasselman said that Ms Comeau then walked away. He said that there was no mention of a knife and, if there had been any mention of a knife throwing incident, he would have gone to investigate as that was a serious charge. He said there was no more conversation about the incident that day.

Mr. Hasselman said that as President of the Local he was privy to a lot of rumours. The incident happened on a Tuesday and he heard no rumours about it Tuesday or Wednesday. He said he was off work Thursday and before his Friday shift he was called at home by the grievor who told him of the suspension. Mr. Hasselman said that when he arrived at work Friday he went to speak to Ms Comeau. He asked what had happened and why she had suspended the grievor for throwing a knife after not mentioning it to him Tuesday. He said Ms Comeau advised that she had been rattled on Tuesday and that she did not seem to want to discuss the matter. He said she did not mention why she had suspended the grievor for knife throwing after not saying anything to him about knife

throwing.

Mr. Hasselman said that if he had been advised about such an incident he would have investigated, which is what he said he did at the beginning of the shift Friday after hearing of the suspension. He said he later filed the grievance.

In cross examination, Mr. Hasselman agreed that he had issues with Ms Comeau, including harassment issues.

Mr. Hasselman agreed that he had passed the card to the grievor with the idea that the grievor would get signatures. He said that the grievor was a friend of the sick woman and he felt a friend should obtain the signatures on the card. Mr. Hasselman said he told Ms Comeau about the card so that she would sign, or at least have an opportunity to sign.

Mr. Hasselman said that the grievor was a Union steward and that the two of them were co-workers, that they had a friendly relationship at work but were not friends outside work.

When Ms Comeau came back after the incident Mr. Hasselman said she was quite different in appearance. He agreed that she looked like a person to whom something upsetting had happened. She had seemed frantic and upset and she mentioned firing the grievor. He said she did not mention tossing a knife. She had indicated she had gone to sign the card and the grievor gave her a hard time. Mr. Hasselman said Ms Comeau told him that the grievor had yelled at her to stay out of his bag. Mr. Hasselman said that he felt if the grievor did not want Ms Comeau to go through his bag it was appropriate to yell at her to stay out.

Mr. Hasselman testified that when he interviewed witnesses Friday October 30 most of them indicated that no knife had been thrown. He agreed that he had not mentioned the evidence of those witnesses on the grievance form itself, but he said that the Union had raised it in the grievance procedure.

In re-examination Mr. Hasselman said that while Ms Comeau seemed frantic that day it had not seemed out of the ordinary for her, that she became frantic quite easily. Mr. Hasselman said that he was not the only employee with issues with Ms Comeau and denied that he was making things up in order to “slam her.”

Servet Kulafofski's evidence

Servet Kulafofski has worked for the Employer for 10 years. On the day of the incident she was working in Vacuum Forming 2, the same area as the grievor. She was working on a machine known as the plugger.

Ms Kulafofski said she first heard Ms Comeau indicating she would “put it down.” When Ms Kulafofski heard that she turned to look and saw Ms Comeau with a little bag in her hand. Ms Kulafofski said that she did not know about the bag before that time. Ms Kulafofski said she saw Ms Comeau put the bag down on the work centre table. Ms Kulafofski said that Ms Comeau then spent 30 seconds “looking at us,” then she walked away toward the aisle and out of the area. Ms Kulafofski said that the grievor then put his knife on the reset button and she turned back to her machine. Ms Kulafofski said that when she turned back to her work Ms Comeau was walking away and the grievor had already put his knife on the reset button.

Ms Kulafofski said that when she turned back toward the location of the incident she saw

the grievor picking up a knife from the floor at a spot where it would have landed if it had fallen from the reset button. As the grievor was picking up the knife, Ms Comeau was at some distance walking away with her back toward the grievor. Ms Kulafofski testified that if the grievor had thrown a knife at Ms Comeau while she was looking in that direction, she would have seen it. Asked if she would have seen the grievor throw the knife if it had happened between the time she saw Ms Comeau holding the bag and when she later saw the grievor pick up the knife from the floor, Ms Kulafofski said that she would have seen it unless it had happened after she saw the grievor place the knife on the reset button. After she saw the grievor put the knife on the reset button she said she turned away briefly and then turned back.

Ms Kulafofski testified that Ms Comeau had spoken to her about this later. She said it was not the same day or the next, but rather was two days after the incident. She said Ms Comeau asked if she had seen the grievor throw a knife at her. Ms Kulafofski said that she had told Ms Comeau no. Ms Kulafofski said that Ms Comeau did not ask her anything else about the incident.

Ms Kulafofski said that after she had heard Ms Comeau say “Fine, I’m going to put it down” she heard Ms Comeau say nothing else.

Ms Kulafofski said her relationship with Ms Comeau was OK, that they got along OK.

Asked about her relationship with the grievor, Ms Kulafofski said that she had not worked with him very long, that they were co-workers but not friends.

Finally, Ms Kulafofski said that she had talked to management about the incident and told them that she had not seen the grievor throw a knife.

In cross examination Ms Kulafofski said that when she first turned Ms Comeau was standing at the work table and the grievor was standing at the cutting table, some 10 to 15 feet apart, with the grievor standing with his back to Ms Comeau. Ms Kulafofski said that at first she was not sure who Ms Comeau was yelling at. Ms Kulafofski said that the grievor was mumbling, saying put it down that it is not yours and she soon “got the picture” they were arguing with each other. Ms Kulafofski said that she did not hear the grievor shout at Ms Comeau to “put that down, its not yours” but did hear him say it to himself. Ms Kulafofski said that she watched until Ms Comeau walked away. She saw the grievor put the knife on the reset button and she turned back to her own work. When she looked again she saw the grievor picking up the knife from the floor. Ms Kulafofski said that if you slam the knife on the reset it sometimes falls.

In re-examination, Ms Kulafofski said that the grievor was angry when he slammed the knife on the reset box. She also said that the location where the grievor later picked the knife up was where it would have been if it had fallen off the reset button, not where Ms Comeau said it had been when it was thrown at her.

Finally, Ms Kulafofski said that she did not see whether the knife remained on the reset button when the grievor put it there, but when she saw the grievor put the knife on the reset button Ms Comeau was already a considerable distance away.

The grievor’s evidence

The grievor said he had worked for the Employer for some 17 years and had been in his current job for a year or two.

The grievor denied throwing a knife at Ms Comeau.

The grievor said that what happened was as follows. Mr. Hasselman gave him a card and asked him to get signatures from people who would like to sign the card. The card was for a co-worker who was very sick. He said he took the card and put it on the work table with other paperwork, intending to get signatures later. At some point he saw Ms Comeau come into the area and watched her walk to the table and pick up the bag with the card. He said Ms Comeau started shaking the bag at him and he stepped over, leaned out into the aisle and loudly told her to put it down. Ms Comeau then opened the bag, took out the card and began to look at it. He said he could not tell whether she had heard him and he said “Leave it alone, put it down now,” because it was not her property. Ms Comeau said “Excuse me” and a few seconds later she put the bag down. The grievor said that Ms Comeau turned and started walking away. He said he had a trim knife in his hand throughout this time and he put the knife on the reset button, but the knife fell off. He said that he was agitated and irritated, that he raised his hands in the air, slapped the cutting table and said “Fuck it.” He said that at that time the knife was already on the floor. He said that he turned back toward Ms Comeau who also turned back and looked at him, that she saw the knife on the floor, and she shook her head and continued walking away. He said he picked the knife up, put it on the reset button, and went back to work. He said that Ms Comeau said nothing at that point.

The Grievor said that Ms Comeau did not say “don’t you ever throw a knife at me again.”

The grievor said that he was right handed and rarely had the knife in his left hand, only when he was reaching for the knife at a time when he already had something in his right hand. He said that when he first put the knife on the reset button the knife was closed (i.e., the blade was retracted). He said that the knife fell on the floor “all the time” and if

the knife was open the blade tended to break. He said that when he put it back on the reset the knife was still closed.

The grievor said that Ms Comeau said nothing about the incident until near the end of the shift two days later when she called him and a union steward to the office and imposed the one day suspension. The grievor said that at that meeting he told Ms Comeau he did not throw anything, that she was making it up and that he had asked her why. He said that Ms Comeau said she had two witnesses but she had refused to say who they were.

In cross examination the grievor agreed that he had not bought the card, that he had been asked by Mr. Hasselman to get signatures. He said that he had the card in a plastic bag. He said he put the bag on the work centre table, a location where he agreed other persons had access. He agreed that it was not unusual for Ms Comeau to be in the area, that she comes by 3 or 4 times in a shift, and that it was not unusual for her to be at the table. He agreed that he had seen her pick up the bag and he told her to leave it alone, to put it down. He agreed that at that time he was near the cutting table and agreed that the two of them would have been about 16 feet apart. He agreed that with the noise and ear protection, he needed to shout at Ms Comeau if he wanted her to hear him. He agreed that he yelled at Ms Comeau a second time. He repeated that he was about 16 feet away from Ms Comeau. He said he never walked any closer to her. The grievor said that Ms Comeau said “Excuse me” and a few seconds after she put down the card and bag. The grievor repeated that he had not walked toward Ms Comeau and denied that he ever got within six feet of Ms Comeau.

The grievor said that he was angry as Ms Comeau was looking at something that did not belong to her. He said she had not asked, she just opened the bag and looked through it. He agreed that Ms Comeau would have known he was angry, that he was saying clearly to

leave it alone, to put it down.

The grievor said he had a knife in his right hand throughout this period. He said he stores the knife on the reset button, that he picks it off the top with his right hand when he pushes the reset button with his right thumb. When he was talking to Ms Comeau he had just finished trimming a part and had not yet put down the knife.

The grievor said that when Ms Comeau started to walk away he still had the knife, that he was still near the cutting table. He denied throwing the trim knife at Ms Comeau, and said that she was lying when she said the knife fell within two feet of her. He agreed that he had picked up the knife but said that was after it had fallen from the reset button. The grievor said that Ms Comeau was then 20 to 25 feet away from him.

The grievor said that sixteen feet was a good estimate of how close he came to Ms Comeau, that he never threw a knife at her, and that the knife never came within two or three feet of Ms Comeau. The grievor repeated that Ms Comeau said nothing about throwing a knife. He said he saw no reason for Ms Comeau to be upset, saw no reason for her to go and speak to Mr. Hasselman, and saw no reason for her to be frantic when she did so. He said Ms Comeau was making up the knife throwing story and he had no idea why she would do so, that he was quite confused by it.

Finally, he agreed that he had become upset during this altercation. He repeated that as Ms Comeau walked away he had put the knife on the reset “a little harder than I should have,” that the knife bounced off, that he had then slapped the table with both hands, and said “Ah, fuck it.”

In re-examination, the grievor said that he found it normal for Ms Comeau to be upset

about something which he did not think should upset her. He also said that he had other property in the bag, including a Rogers video.

PROVISION OF THE *COLLECTIVE AGREEMENT*

The following is the key provision of the parties' 2007-2010 collective agreement:

ARTICLE IV MANAGEMENT RIGHTS

4.01 The Union acknowledges that it is the exclusive function of the Company to:

...

(b) ... discipline or discharge for proper cause, any employee ...

...

EMPLOYER POSITION

The Employer submitted that I should deal with three issues - what happened, did it justify any discipline, and if so, was the suspension too severe. The Employer said that there were two dramatically different versions of what happened and that I should decide which version was consistent with the circumstances. In assessing credibility the Employer relied upon the approach from *Brown & Beatty*, (below), quoting *Faryna v. Chorny*.

The Employer urged me to accept the version of Ms Comeau over that of the grievor and Mr. Hasselman. There was no reason for Ms Comeau to make up her story. Her evidence was consistent with her subsequent conduct. She was clearly upset, even frantic, when she spoke later to Mr. Hasselman. She made notes right after the event. She investigated the event. She consulted with management. Her evidence was

consistent with the other circumstances.

The grievor's version of events was not plausible. Something about the bag with the card made him go off. He admitted to being angry but he was so angry that it suggests more happened than he was willing to say.

Mr. Hasselman's version was not plausible. He agreed that something significant happened and agreed that Ms Comeau spoke to him but did not agree with what was said.

The Employer urged me to accept Ms Comeau's version of that conversation. Mr. Hasselman was a combative witness in cross examination, refused to concede obvious extensions of what he had said in chief and refused to concede that he had told Ms Comeau about the card so that she could sign it. While acknowledging that Ms Comeau was frantic, he maintained that there was nothing for him to investigate. He was generally argumentative and while he conceded that Ms Comeau said she would fire the grievor if he did "something" again, he denied that she had mentioned the knife throwing. The Employer asked me to find that "the something" was throwing a knife.

As for Ms Kulafofski, she saw only part of the event. Her work required her to normally face in the other direction and she turned toward the incident on two occasions but did not see it all. The Employer said that Ms Kulafofski may well have turned in that direction late in the incident after the knife was thrown and saw only the grievor slam the knife on the reset button box, where it bounced and hit the floor for a second time.

The Employer conceded that if there was no knife throwing, then there should be no discipline.

The Employer reviewed several arbitration awards and submitted that a one day

suspension for throwing a knife was reasonable.

The Employer relied upon the following authorities: *Canadian Labour Arbitration* (4th edition) Brown & Beatty, Canada Law Book, Section 3:5110 (Assessing Credibility); *Re United Steelworkers, Local 2784, and Pedlar People Ltd.* (1972), 24 L.A.C. 277, 1972 CLB 1768 (Hanrahan); *Re Slater Steel Industries Ltd., Burlington Steel Division and United Steelworkers, Local 4752* (1975), 8 L.A.C. (2d) 135 (Shime); *Accuride Canada Inc. and Canadian Automobile Workers, Local 27* (unreported), July 7, 1993 (Verity); *Johnson Controls LP, Automotive Systems Group, Tillsonburg and National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Local 1859* (unreported), November 15, 2008 (Haeffling); *Kromet International Inc. and International Association of Machinists and Aerospace Workers, Local Lodge 2707* (unreported), December 21, 2007 (Surdykowski); and *Sobeys Milton Retail Support Centre and United Food and Commercial Workers Canada, Local 175* [2010] O.L.A.A. No. 120 (Marcotte).

UNION POSITION

The Union agreed that credibility was the key issue and further agreed that, if I found that the grievor had thrown a knife, discipline was appropriate.

However, the Union submitted that the grievor did not throw the trim knife and that it was implausible to think that he had done so. The Union said that it was necessary to put the evidence of the four witnesses together and determine what had happened. The Union said I should concentrate on what version best fit with the preponderance of possibilities.

The Union said that it made no sense to think the grievor turned his back on his

supervisor and, with his non-throwing arm, threw a knife at her. The Union suggested that Ms Comeau heard the knife, turned and saw it, saw the grievor with his hands in the air and perhaps genuinely thought he threw the knife. She later asked other employees if they had seen the grievor throw the knife and when they said no, she asked nothing more.

She did not investigate, she simply looked for support for what she believed had happened.

Three persons testified about what had happened during the incident - Ms Comeau, the grievor and Ms Kulafofski. Ms Kulafofski was not challenged as to what she saw. The Employer did not suggest that what she saw was inaccurate, but what she saw was inconsistent with the evidence of Ms Comeau. Assuming I have difficulty deciding between the evidence of Ms Comeau and the grievor, there was the evidence of Ms Kulafofski, an independent witness who had no difficulties with either Ms Comeau or the grievor.

Ms Kulafofski said that she turned when she heard Ms Comeau yelling and saw the events continuously from that time - she observed the events from a time when Ms Comeau had the bag, put it down, walked away from the area and the grievor put the knife on the reset button. She saw all that before she turned and went back to work. Ms Kulafofski said that she soon heard the grievor, turned back in that direction and saw the grievor pick up the trim knife from the floor where she would expect it to be had it fallen from the reset button.

Ms Kulafofski saw the events continuously from the point that Ms Comeau had the bag in her hand until the point at which Ms Comeau was walking away and the grievor was putting the knife on the reset button. That was the relevant part of the incident and Ms Kulafofski saw all of it, and her evidence was inconsistent with that of Ms Comeau. The

suggestion that the grievor threw the knife after Ms Kulafowski turned away is inconsistent with the evidence of Ms Comeau who testified that the knife was thrown before she walked away. There was no evidence suggesting that the knife hit the floor twice, or that Ms Comeau walked away twice. One witness, whose credibility was not challenged, saw the whole thing and her evidence was inconsistent with that of Ms Comeau.

Moreover, it was not plausible that Ms Comeau would go through the rest of that shift, all the next and most of a third shift and say nothing about this to the grievor.

It was not plausible to think that Ms Comeau went to Mr. Hasselman and told him the grievor had thrown a knife at her and that Mr. Hasselman simply went back to work. It is much more plausible to think that she was upset and angry about the grievor yelling at her to stay out of his stuff and that she told Mr. Hasselman about that incident. Mr. Hasselman's evidence that he told Ms Comeau she could not fire the grievor for wanting her to stay out of his stuff is entirely consistent and plausible. Mr. Hasselman testified that Ms Comeau easily got upset and angry. For Ms Comeau to be frantic over this card incident would be consistent with that evidence.

The Union asked that the suspension be removed. If I found that the grievor threw the knife, the Union asked that I substitute a written warning for the suspension.

The Union relied upon the following authorities: *City of Hamilton and Canadian Union of Public Employees, Local 5167* [2009] O.L.A.A. No. 362, 2009 CanLII 39198, 98 C.L.A.S. 239 (Knopf); and *Maple Leaf Consumer Foods Inc. and Schneider Employees' Association* (2008), 92 C.L.A.S. 246, 2008 CLB 282, [2008] OLAA 68 (Petryshen).

CONCLUSIONS

Both parties indicated discipline was warranted if the grievor threw the trim knife at his supervisor. The parties also agreed no discipline was appropriate if the grievor did not throw the knife. I agree with the parties and, as a result, the main issue to be determined is whether the grievor threw the knife at his supervisor.

Four witnesses testified and their evidence was inconsistent on this crucial issue. It is not possible to reconcile their evidence. The credibility of the witnesses and their evidence must be assessed.

On this issue of credibility, I agree with the approach in *Brown & Beatty*, (above), which has a lengthy quote from the B.C. Court of Appeal in *Faryna v. Chorny*. The Court indicated that when the evidence of witnesses differ, determining which witness(es) to believe and determining what happened does not simply require an assessment of who sounded more definite or persuasive. Instead, the evidence should be carefully scrutinized to determine what is more consistent with the surrounding situation. The evidence should be tested in any way possible in order to assess its consistency with the likely events.

Ms Comeau, Mr. Hasselman, Ms Kulafowski, and the grievor all testified confidently and each version of events seemed possible. I was left with the impression that they were each relating the events as they believed them to have occurred. But, of course, their evidence cannot all have been accurate as there were clear and obvious contradictions between their various versions of events.

In determining what happened I begin with the evidence of Ms Kulafowski. Admittedly she observed only some of the exchange between the grievor and Ms Comeau, but she

was watching during the crucial period of time. Her evidence was not seriously challenged by the Employer in cross examination, although the Employer did attempt in its submissions to limit its impact by noting, correctly, that Ms Kulafowski had not observed some events.

There was no suggestion that Ms Kulafowski had any interest in this matter. I use the term interest in the legal sense as meaning that the outcome of the grievance might benefit the witness. In such a situation, the concern is that the witness might testify in a manner so as to make that outcome more likely. There was no suggestion of any reason why Ms Kulafowski might be inclined to shape her evidence in favour of either her Employer or her Union. On the other hand, both the grievor and Ms Comeau had a real interest in this issue and each had reasons to shape their evidence to support their interest.

Similarly, Mr. Hasselman, as President of the local Union, had an interest in the outcome of this arbitration.

Moreover, whether or not Ms Comeau is easily upset, the evidence was clear that she was very upset at this time. So, too, was the grievor. In my experience upset or emotional witnesses are generally not the best witnesses. Because emotional reaction may colour the recollection or interpretation of events, the evidence of a dispassionate witness is more likely to be accurate. In this instance, as a starting point I would think that the evidence of Ms Kulafowski, who had no interest in the issue and had no emotional involvement in the incident, was more likely to be accurate than that of either Ms Comeau or the grievor.

Ms Kulafowski said she first heard Ms Comeau saying she would put the bag down. Both Ms Comeau's evidence and the grievor's evidence indicated that this occurred after the incident began. They both testified that Ms Comeau came to the work area, picked up the bag with the card, and that loud words were exchanged before Ms Comeau put the

bag down. But Ms Comeau did not make any suggestion that a knife had been thrown before she put the bag down. In other words, Ms Kulafofski had turned toward the grievor and Ms Comeau before the point at which Ms Comeau said a knife was thrown.

Ms Kulafofski testified that she saw Ms Comeau put the bag down and after about 30 seconds Ms Comeau walked away. Ms Kulafofski said that she watched Ms Comeau walk away and saw the grievor put his knife on the reset button before Ms Kulafofski turned back toward her own work.

Ms Comeau was clear that the knife was thrown before she walked away. If I accept Ms Comeau's version of events, the knife had to have been thrown while Ms Kulafofski testified that she was watching the incident. But Ms Kulafofski saw no knife throwing by anyone.

Moreover, Ms Kulafofski said that although she had turned back toward her own work she soon heard the grievor and turned once more in that direction. At that point Ms Kulafofski said that she saw the grievor pick up a knife from the floor in a location that Ms Kulafofski said it would have been had it fallen from the reset button, not in the area where Ms Comeau said it landed. Ms Kulafofski said that Ms Comeau was then still walking away.

Ms Kulafofski's evidence regarding any knife throwing is generally consistent with that of the grievor and it is inconsistent with the evidence of Ms Comeau.

I was troubled by Ms Comeau's evidence about the knife throwing. She testified emphatically that the grievor had thrown the knife with his left hand. She demonstrated how that had been done with a motion over her shoulder such that the knife would have passed her head about ear level. She then stressed that her evidence was 100% correct.

But when she was later asked about her written notes (quoted above) in which her description of the knife throwing differed from what she testified to in the hearing, she said that she was not sure how the knife had been thrown, that she could not say whether it was thrown over the head or over the shoulder.

Ms Comeau began in a very definite manner about how the knife had been thrown, and later agreed that she was not sure. Assuming a knife had been thrown, I can accept that in her state of upset Ms Comeau might have been uncertain as to how it was thrown. But she did not initially indicate any uncertainty. It was only when she was confronted with her own notes which suggested a different type of throw that she back-tracked. I was left to wonder what she truly remembered.

I am also somewhat troubled by the evidence that the grievor is right handed. It would seem to me to be unlikely that he would have thrown a knife with his left hand, as Ms Comeau testified he did.

Ms Comeau and Ms Kulafowski also disagreed about which day Ms Comeau asked Ms Kulafowski whether she had seen the grievor throw a knife. Ms Comeau said that it had been Tuesday, the day of the incident, whereas Ms Kulafowski said it was two days later on Thursday. Ms Comeau was once again very definite about the specific date that she had spoken to Ms Kulafowski and the two other employees, but it seems more likely that it was as Ms Kulafowski testified.

Moreover, I think that if Ms Kulafowski and the others had been asked on Tuesday about a knife throwing incident, there would have been rumours in the plant about the incident and the investigation. Mr. Hasselman heard no rumours, although as President he said he would normally hear such talk. This also suggests to me that Ms Comeau was incorrect about the day she interviewed Ms Kulafowski and it further suggests that she may have

been incorrect about other details.

What of the other circumstances? Ms Comeau said that she advised Mr. Hasselman of the knife throwing and Mr. Hasselman denied being told. They both agreed that Ms Comeau was upset, or even frantic, at that time. Given her state, it is unlikely that Ms Comeau would have related her story in a calm or organized manner. Mr. Hasselman's evidence was that her story was somewhat confused. Mr. Hasselman said he attempted to find out what was wrong and that Ms Comeau had described problems with the card. Mr. Hasselman said he heard about problems with the card, that he had responded to those concerns and indicated to Ms Comeau that an employee could not be disciplined for that conduct. Mr. Hasselman testified that Ms Comeau did not raise a knife throwing incident.

It is possible that Ms Comeau later in that same conversation raised the issue of knife throwing but, if she did, I accept that Mr. Hasselman did not hear the comment. If Mr. Hasselman had heard about a knife throwing incident I do not think that he would have said or done nothing, as was both Ms Comeau's and Mr. Hasselman's evidence.

Assuming that Ms Comeau believed the grievor threw a knife at her, it is possible that the reason Ms Comeau later was unsure about the throwing was because she did not actually see any knife being thrown. Ms Comeau's evidence was consistent with her being confident that a knife was thrown, but not actually having seen a knife being thrown.

While I have considered a variety of issues and a variety of factors in attempting to determine what happened that day, it is unnecessary for me to determine precisely what each witness saw, or thought, or did. I only have to decide whether the grievor threw a knife at Ms Comeau.

On the narrow issue of whether the grievor threw a knife, Ms Kulafowski saw Ms Comeau

and the grievor throughout the time during which Ms Comeau said a knife was thrown, and Ms Kulafowski saw no such thing take place. The grievor's evidence was consistent with Ms Kulafowski's evidence and he was emphatic that no knife was thrown.

Considering all the evidence I conclude, on a balance of probabilities, that the grievor did not throw a knife at Ms Comeau as she alleged he had done.

As a result, the grievance is allowed. I direct the Employer to remove the suspension from the grievor's record and to compensate the grievor for his monetary loss. I leave it to the parties to work out the details regarding the compensation.

I will remain seised to deal with any issues which may arise in the implementation of this award, as well as to deal with the dismissal grievance.

Dated in London, Ontario, this 17th day of February, 2011.

Howard Snow, Arbitrator