

ARBITRATION TRIBUNAL

Canada
PROVINCE OF QUEBEC

File no.:

Date: January 6, 2012

BEFORE THE ARBITRATOR: M^e FRANÇOIS HAMELIN

Bell Canada,

Hereinafter called "Bell"

And

Communications, Energy and Paperworkers Union of Canada (CEP) – Craft and Services Employees

Hereinafter called "CEP Bell"

Grievance n^o 084-0092-L, filed by Mr. Hakim Yonis [hereinafter called the "Grievor"]

Dispute: Claim for hours paid at a premium rate

Collective agreement: June 5, 2008 to November 30, 2012

Counsel for the Employer: M^e Amal Garzouzi
Counsel for the Union: M^e Maxime Lazure-Bérubé

Mandate: August 10, 2009
Hearing: November 28, 2011
Award: January 6, 2012

ARBITRATION AWARD
(Canada Labour Code)

I- THE DISPUTE

- [1] On March 5, 2009, CEP Bell filed the present grievance, which reads as follows:

DATE OF THE INCIDENT GIVING RISE TO THE GRIEVANCE OR COMPLAINT: 2009-02-20

NATURE OF THE GRIEVANCE OR COMPLAINT (INCLUDING ALLEGED LOSS OR PREJUDICE): Incorrect payment for overtime worked in excess of two hours in a week.

ARTICLES OF THE COLLECTIVE AGREEMENT ALLEGED TO HAVE BEEN BREACHED: Articles 18, 19 as well as all other relevant clauses in the collective agreement.

REMEDY SOUGHT: That Bell immediately and in the future comply with the articles of the collective agreement mentioned above and that it compensate me for my overtime hours as it always has in the past; i.e., at the rate of time and a half for all hours worked in excess of 8 hours per day and at double time for all [overtime] hours worked in excess of 2 hours in a week, without prejudice to my rights and privileges.

- [2] On July 17, 2009, the Employer refused to allow the grievance for the following reasons:

It is our opinion that the payment at double time of overtime worked by part-time technicians applies only where the employee has worked his 40 basic hours of work in a given week, as defined in Article 18.02 of the collective agreement (i.e., 40 hours paid at straight time) and where he has also worked 2 overtime hours paid at time and a half in the same week as defined in Article 19.13 (a) of the collective agreement.

Consequently, this grievance is denied.

II- THE EVIDENCE

- [3] At the hearing, the respective counsel for the parties first made the following admissions:

LIST OF ADMISSIONS ESTABLISHED BETWEEN THE PARTIES

WITH REGARD TO GRIEVANCE 084-0092-L, THE PARTIES AGREE TO JOINTLY SUBMIT THE FOLLOWING ADMISSIONS TO THE ARBITRATOR:

1. The Employer and the Union are bound by the collective agreement S-1 in force from June 5, 2008 to November 30, 2012;

2. On March 5, 2009, the Union submitted grievance n° 084-0092-L S-2 to the Employer concerning the Grievor Mr. Hakim Yonis;
3. This is a policy grievance concerning the interpretation of the collective agreement S-1, in which the Union alleges that the Employer has failed to comply with the provisions of the collective agreement regarding the payment of overtime to part-time employees;
4. On July 17, 2009, the Employer submitted to the Union its written response S-3 to grievance S-2;
5. On July 28, 2009, the Union served notice of arbitration S-4 on the Employer regarding grievance S-2;
6. The parties agreed to designate M^e François Hamelin as the arbitrator to adjudicate upon the grievance S-2;
7. The parties agree that the grievance and arbitration procedure provided for in collective agreement S-1 has been followed and that they have no preliminary or jurisdictional issues to raise and that the grievance S-2 has been validly brought before the present arbitration tribunal;
8. The Grievor has been employed by the Company since February 16, 2004;
9. In February 2009, at the time of the alleged offence, the Grievor held the position of Business Services Technician I and was a regular part-time employee;
10. For the week of February 1 to 7, 2009, the work schedule provided by the Employer to the Grievor called for 5 days at 7.5 hours a day (February 3, 4, 5, 6 and 7, 2009), for a total of 37.5 hours for that week, the whole as it appears from the work schedule S-5;
11. During this first week of the month of February 2009, the Grievor respected the work schedule S-5 established by the Employer and was not required to work any hours in excess of this schedule S-5, the whole as it appears from his activity calendar for the month of February 2009, exhibit S-6;
12. For the following week, i.e., from February 8 to 14, 2009, the work schedule provided to the Grievor also called for 5 days at 7.5 hours a day (February 8, 9, 10, 13 and 14, 2009), for a total of 37.5 hours for that week, the whole as it appears from exhibit S-5;

13. The Grievor did in fact work 7.5 hours a day for 3 days on February 8, 9 and 10, 2009, as per his schedule S-5. However, he worked 11.5 consecutive hours on Friday, February 13, 2009, with 4 of those hours being recorded as overtime. On the day of Saturday, February 14, 2009, he worked 14 consecutive hours, with 6 of those hours being recorded as overtime, the whole as it appears from the Grievor's activity calendar S-6;
14. For this pay period, from February 1 to 14, 2009 inclusively, the Employer paid the Grievor 75.5 hours at straight time and 10 hours at the overtime rate of 1.5 times his basic hourly rate, the whole as it appears from the Grievor's pay stub for this period, filed as exhibit S-7;
15. It is the position of the Employer that the hours worked in excess of the 7.5 hours scheduled on February 13 should have been paid as follows: 0.5 hours at straight time plus 6 hours at time and one half;
16. As regards the hours worked in excess of the 7.5 hours scheduled for February 14, it is the Employer's position that they should have been paid as follows: 0.5 hour at straight time plus 6 hours at time and one half;
17. It is the position of the Union that the hours worked in excess of the 37.5 hours scheduled for the week of February 8 to 14, 2009, should have been paid as follows: 0.5 hours at straight time for the first 8 hours (February 13), 0.5 hours at straight time for the first 8 hours (February 14), the first 2 hours of overtime at time and one half and 7.5 hours at double time;
18. [*sic*]

[4] The Union then had Mr. Alain Paradis, vice-president of the Union, testify, while the Employer had Ms. Diane Moses, Labour Relations Consultant, testify for the defence.

[5] For a better understanding of the dispute, I refer the reader to the table¹ that reproduces the Grievor's work schedule between February 1 and 14, 2009, including the hours actually worked by him during these two weeks and the parties' respective position on the compensation to which they believe the Grievor is entitled.

[6] At the hearing, Mr. Paradis explained that the Union's position is supported by the provisions of Article 19.13 of the collective agreement, according to which, after having worked his basic weekly hours of work, the employee is paid at one and one half times (150%) his basic hourly rate for the first two additional hours worked, and at double time (200%) for any additional hours worked thereafter.

¹ See Exhibit "A."

[7] Ms. Moses, for her part, maintained that the Employer's position is supported by Article 19.11 of the collective agreement, which stipulates that an employee who performs more than eight hours of work a day is paid at one and one half times (150%) his basic hourly rate.

[8] With regard to Article 19.13, she argued, it only applies where the weekly schedule of a part-time employee is 40 hours or where the employee has actually worked and been paid for 40 hours at 100% in a given week, which, she added, is not the case of the Grievor.

III- ARGUMENTS OF THE PARTIES

A) Submission of the Union

[9] According to counsel for the Union, the expression "basic hours of work" defined in Article 18.01 applies to all employees, regardless of whether they are full-time or part-time employees.

[10] Article 18.02, he continues, which refers specifically to full-time employees, provides for basic hours of work per week of eight hours on the basis of a five-day week, while Article 18.03 stipulates that the basic hours of work of part-time employees shall be determined by the Employer, but that these employees "*shall be scheduled a minimum of 72 hours per established period of 4 weeks.*"

[11] However, adds counsel for the Union, Article 19.13, which, along with Article 19.11 and 19.12, deals with "*overtime payment of part-time employees,*" stipulates explicitly that, once a part-time employee has worked his basic hours in a given week, the first two hours of overtime shall be paid at one and one-half times (150%) his basic hourly rate, and any subsequent hours shall be paid at double (200%) his basic hourly rate.

[12] Counsel argues that the Employer's position that Article 19.13 only applies to part-time employees whose schedule provides for 40 hours of work in a given week does not stand up to scrutiny, because this would mean that the other part-time employees would not be entitled to double time pay for the sole reason that the Employer did not schedule them for 40 hours in a week.

B) Submission of the Employer

[13] For her part, counsel for the Employer maintains that the expression daily or weekly "basic hours of work" refers to basic hours of work of full-time employees and means eight hours of work per day, five days per week, for a total of 40 hours a week.

[14] Contrary to the Union's allegations, she adds, Article 18.01 is of a general nature and applies to both full-time and part-time employees.

[15] Counsel goes on to say that it is on the basis of this article that one must interpret articles 19.11 to 19.13, which deal with *"overtime payment of part-time employees."*

[16] More specifically, she declares, Article 19.13, according to which part-time employees are entitled to one and one half times (150%) their basic hourly rate for the first two hours of overtime and at the employee's hourly rate multiplied by two times (200%) any additional hours worked *"[w]here a Part-Time employee has worked the basic hours per week in a given week"* refers to the basic hours of worked defined in Article 18.01 as being 40 hours.

[17] Counsel for the Employer therefore concludes that, in order for the Employer to pay a part-time employee at double (200%) his basic hourly rate, it must have previously established a work schedule of 40 hours for the week for that employee.

[18] Counsel adds that allowing the Union's theory would mean that a part-time employee whose weekly work schedule is established at 25 hours and who performs five additional hours of work would be entitled to be paid at one and one half times his hourly rate for the first two additional hours and at double time for the three other hours, whereas a full-time employee is paid at straight time for his first 40 hours of work.

IV- THE LAW

[19] The clauses of the collective agreement that are relevant to the resolution of this dispute are as follows:

ARTICLE 9 – DEFINITIONS

9.01 [...]

(d) "Full-Time Employee" means an employee (Regular or Temporary) who is normally required to work the basic hours of work as established for his occupation.

(e) "Part-Time Employee" means an employee (Regular or Temporary) who is normally required to work less than the basic hours of work for a Full-Time employee.

A Part-Time employee shall not be construed to occupy or to have claim to a Full-Time position by virtue of having worked the basic hours of work established for a Full-Time employee.

[...]

ARTICLE 18 – HOURS OF WORK

Definitions

For the purpose of this Agreement,

18.01 "Basic Hours of Work" means the number of hours of work per day and per week as established by this Agreement and set forth in this Article for Full-Time employees.

(a) "Tour of Duty" means the time worked by an employee on any working day.

(b) "Scheduled Tour of Duty" means a tour of duty not exceeding the basic hours of work per day which an employee is scheduled to work and of which he has been advised in advance.

(c) "Scheduled Work Week" means the scheduled tours of duty comprising the basic hours of work for the week.

(d) "Day Tour" means a tour of duty which falls between the hours of 7:00 A.M. and 6:00 P.M.

(e) "Off-Normal Tour" means a tour of duty, all or a portion of which falls between the hours of 6:00 P.M. of one day and 7:00 A.M. of the following day.

Full-Time Employees

18.02 The basic hours of work per day for a Full-Time employee shall be 8 hours.

The basic hours of work per week for a Full-Time employee shall be 40 hours on the basis of a five day week. However, the basic hours of work may be averaged over a two week period on the basis of ten days totalling 80 hours.

Part-Time Employees

18.03 The Company shall determine and establish the hours of work per day and days of work per week for all Part-Time employees.

A Regular Part-Time employee shall be scheduled a minimum of 72 hours per established period of 4 weeks, in increments of not less than one-half

tour, except in situations where the Director - Industrial Relations and the appropriate Vice-President of the Union or their delegate agree that a number of employees are surplus.

[...]

ARTICLE 19 - OVERTIME

19.01 "Overtime" means the time worked by an employee:

- (a) in addition to his scheduled tour of duty on any day, or
- (b) on a day outside his scheduled work week.

[...]

Overtime Payments - Full-Time Employees

19.05 Payment for overtime work shall be made at the employee's hourly rate multiplied by one and one-half times the hours worked, except that overtime worked:

- (a) in excess of two hours in one week, or
- (b) on a Sunday without 48 hours' notice, or
- (c) in excess of the basic hours of work and time worked on a holiday without 48 hours' notice,

shall be at the employee's hourly rate multiplied by two times the hours worked.

[...]

Overtime Payment - Part-Time Employees

19.11 A Part-Time employee, who works more than his scheduled hours on any day, shall be paid on a straight time basis until he has worked eight hours per day, and on a time and one-half basis for time worked in excess of the eight hours.

19.12 A Part-Time employee, who works more than his scheduled tours of duty in any week, shall be paid on a straight time basis until he has worked the basic hours per week, and on a time and one-half basis for time worked in excess of the basic hours.

19.13 Where a Part-Time employee has worked the basic hours per week in a given week, payment for overtime worked:

(a) in excess of two hours in one week, or

(b) on a Sunday without 48 hours' notice,

shall be at the employee's hourly rate multiplied by two times the hours worked.

[Underlining added]

V- DECISION AND REASONS

[20] The present grievance claims that the two first hours worked by the Grievor, who is a part-time employee, in excess of eight hours per day on February 13 and 14, 2009, should be paid at one and one half times (150%) his basic hourly rate and that the 7.5 additional hours should be paid at double time (200%).

[21] The solution to the dispute lies, obviously, in the collective agreement, and particularly in Article 18, which deals with hours of work, and Article 19, which deals with overtime.

A) Article 9

[22] First and foremost, we must recall the definitions of full-time employee and part-time employee, as set out in Article 9.

[23] Article 9.01 (d) stipulates that "*Full-Time Employee*" means an employee [...] who is normally required to work the basic hours of work as established for his occupation" [underlining added], while Article 9.01 (e) defines a part-time employee as "*an employee [...] who is normally required to work less than the basic hours of work for a Full-Time employee*" [underlining added].

[24] For its part, Article 18.02 stipulates that "The basic hours of work per day for a Full-Time employee shall be 8 hours [...]" [underlining added] and that "The basic hours of work per week for a Full-Time employee shall be 40 hours on the basis of a five day week" [underlining added]. In other words, Article 18.02 provides for the daily basic hours of work and the weekly basic hours of work.

B) Article 18

[25] Let us now examine the provisions set out in Article 18 with regard to "*hours of work*," specifically normal hours of work.

[26] Article 18.01 starts by offering several definitions, preceded by the introduction "*For the purpose of this Agreement*". In other words, unless

otherwise indicated, these general definitions apply to all provisions set out in this article, and more specifically to all categories of employees, whether full-time or part-time.

[27] Article 18.01 goes on to specify that “*“Basic Hours of Work” means the number of hours of work per day and per week as established by this Agreement and set forth in this Article for Full-Time employees*” [underlining added], and adds other general definitions that are manifestly applicable to all employee categories, including definitions of the terms “*Tour of Duty,*” “*Scheduled Tour of Duty*” and “*Scheduled Work Week.*”

[28] For its part, Article 18.02, which specifically concerns full-time employees, stipulates that “*The basic hours of work per day for a Full-Time employee shall be 8 hours [...],*” and then goes on to specify that “*The basic hours of work per week for a Full-Time employee shall be 40 hours on the basis of a five day week.*”

[29] Why define the basic hours of work in Article 18.01 if the following article defines the basic hours of work of a full-time employee? The reason is simple: the definition set out in Article 18.01 applies to both full-time employees and part-time employees. Otherwise, we could only conclude that the parties were just “talking for the sake of talking.”

[30] In other words, by agreeing to the definition of the term “*basic hours of work*” in Article 18.01, the parties’ intention was to specify that, for all employees, whether full-time or part-time, the expression “*basic hours of work*” means eight hours a day, five days a week, for a weekly schedule of 40 hours.

[31] Let us take this analysis a step further: Article 18.02, which concerns full-time employees, sets out the principle of a normal weekly schedule of 40 hours on the basis of eight hours a day spread over five days.

[32] For its part, Article 18.03, which concerns part-time employees, stipulates that “*The Company shall determine and establish the hours of work per day and days of work per week*” for these employees. It is important to note that the article refers to “*hours of work per day,*” and not “*basic hours of work.*”

[33] Moreover, Article 18.03 stipulates that the “*Part-Time employee shall be scheduled a minimum of 72 hours per established period of 4 weeks*” by the Employer.

C) Article 19

[34] Article 19 concerns overtime.

[35] Article 19.01, which establishes that “*“Overtime” means the time worked by an employee: (a) in addition to his scheduled tour of duty on any day, or (b) on a*

day outside his scheduled work week,” is of a general nature and applies to all employee categories.

[36] This article does not specify how these overtime hours are paid; for this, we must refer to Articles 19.05 and 19.11 to 19.13.

[37] Article 19.05, entitled “*Overtime Payments - Full-Time Employees,*” provides for the first two hours of overtime worked by this category of employee to be paid at the employee's basic hourly rate multiplied by one and one-half times (150%) the hours worked, while subsequent hours are paid at the employee's basic hourly rate multiplied by two times (200%) the hours worked.

[38] As for articles 19.11 to 19.13, they are concerned with “*Overtime Payment - Part-Time Employees.*”

[39] Article 19.11 provides for the compensation that the Employer must pay to a part-time employee who works more than eight hours per day. This article stipulates that “*A Part-Time employee, who works more than his scheduled hours on any day, shall be paid on a straight time basis until he has worked eight hours per day, and on a time and one-half basis for time worked in excess of the eight hours.*” In other words, the first eight hours of work performed by a part-time employee in a given day are paid at the employee’s basic hourly rate, and any additional hours are paid at one and one half times (150%) his basic hourly rate.

[40] In this case, according to the schedule established by the Employer, the Grievor was supposed to work 7.5 hours on Friday, February 13, 2009. In actual fact, he worked 11.5 hours. In accordance with the terms of Article 19.11, the payment owed to him by the Employer was 8 hours at his basic hourly rate and 3.5 hours at one and one half times (150%) his basic hourly rate.

[41] The same goes for Saturday, February 14: according to the schedule established by the Employer, the Grievor was supposed to work 7.5 hours on that day, but, in actual fact, he worked 14 hours. Here too, in accordance with the terms of Article 19.11, he was therefore entitled to 8 hours at his basic hourly rate and 6 hours at one and one half times (150%) his basic hourly rate.

[42] This is exactly what he was paid by the Employer for these two days.

[43] Let us continue our analysis by looking at Article 19.12, which provides for the remuneration to be paid by the Employer to a part-time employee who works on a day that was not on his schedule. Indeed, this article refers to the case of a “*Part-Time employee, who works more than his scheduled tours of duty,*” or, if one prefers, who works an unscheduled tour of duty.

[44] In such a case, according to this article, this employee “*shall be paid on a straight time basis until he has worked the basic hours per week,*” meaning 40 hours, since the basic hours per week are established at 40 hours, and “*on a time and one-half basis for time worked in excess of the basic hours.*”

[45] As we have seen, Article 18.01 stipulates that “*Basic Hours of Work*” means the number of hours of work per day and per week,” and this means that the “*Basic Hours of Work*” for all employees, regardless of their category, are eight hours per day, 40 hours per week, based on a five-day week.

[46] However, Article 19.12 does not apply in this case, since the Grievor did not work on a day that was not on his schedule.

[47] As for Article 19.13, it specifies the compensation to be paid to a part-time employee who has worked the “*basic hours per week in a given week*,” that is, who has worked 40 hours in five days.

[48] In such a case, according to this article, this part-time employee is entitled to one and one half times (150%) his basic hourly rate for the first two additional hours and to double (200%) his basic hourly rate for all subsequent hours.

[49] In this case, according to the schedule established by the Employer, the Grievor was supposed to work 37.5 hours during the week of February 8, 2009, but in actual fact, he worked 48 hours; in accordance with Article 19.13, the Employer was therefore required to pay him 40 hours at his basic hourly rate, two hours at one and one half times (150%) his basic hourly rate and six hours at double (200%) his basic hourly rate.

[50] However, one must also take into account the additional compensation to which the Grievor was entitled pursuant to Article 19.11, i.e., 9.5 hours paid at time and one half (150%) for the worked performed on February 13 and 14. This compensation was, in effect, paid to the Grievor.

[51] Under the circumstances, pursuant to Article 19.13, the Grievor was entitled to be paid at double (200%) his basic hourly rate for six of the 9.5 hours worked on February 13 and 14, 2009. Consequently, the Employer owes the Grievor six hours of work at half (50%) of his basic hourly rate, that being the difference between double (200%) his basic hourly rate for six hours of work and one and one half times (150%) his basic hourly rate that he has already been paid for these same six hours of work.

VI- AWARD

[52] For all the above reasons, having examined the evidence and submissions, verified the applicable legislation and case law and deliberated on the whole:

- I PARTIALLY UPHOLD the grievance n° 084-0092-L filed by Mr. Hakim Yonis;
- I DECLARE that, in the week of February 8 to 14, the Grievor was entitled to the following compensation:

- 40 hours at his basic hourly rate
 - 2 hours at one and one half times (150%) his basic hourly rate
 - 6 hours at double (200%) his basic hourly rate
- I ORDER the Employer to pay the Grievor the difference between the salary he actually received and that he should have received, i.e., six hours at half (50%) of his basic hourly rate, plus any interest required by statute.
- I RESERVE JURISDICTION with regard to the application of this ruling in the event of disagreement between the parties.

[signed François Hamelin]

François Hamelin, Arbitrator

For the Union: M^e Maxime Lazure-Bérubé
For the Employer: M^e Amal Garzouzi

Mandate: August 10, 2009
Hearing date: November 28, 2009
Date of the award: January 6, 2012

Ref.: 5798-G
c:\hamelin\bell-jan12

EXHIBIT "A"

GRIEVOR'S WORK WEEKS

February 1st to 14th, 2009

Date	Work schedule	Hours worked	Employer's position	Union's position
S – Feb. 1	Day off	--	--	--
M – Feb. 2	Day off	--	--	--
T – Feb. 3	7.5	7.5	7.5	7.5
W – Feb. 4	7.5	7.5	7.5	7.5
T – Feb. 5	7.5	7.5	7.5	7.5
F – Feb. 6	7.5	7.5	7.5	7.5
S – Feb. 7	7.5	7.5	7.5	7.5
S – Feb. 8	7.5	7.5	7.5	7.5
M – Feb. 9	7.5	7.5	7.5	7.5
T – Feb. 10	7.5	7.5	7.5	7.5
W – Feb. 11	Day off	--	--	--
T – Feb. 12	Day off	--	--	--
F – Feb. 13	7.5	11.5	8 hrs 100% 3.5 hrs 150%	8 hrs 100% 2 hrs 150% 1.5 hr 200%
S – Feb. 14	7.5	14	8 hrs 100% 6 hrs 150%	8 hrs 100% 6 hrs 200%
	<hr/> 75 hrs	<hr/> 85.5 hrs	<hr/> 76 hrs 100% 9.5 hrs 150%	<hr/> 76 hrs 100% 2 hrs 150% 7.5 hrs 200%