



Significant victory for Quebec employers in relation to employees with annual salaries

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On May 6, 2019, the Honourable Justice Chantal Lamarche, J.S.C., issued a decision in *Godin c. Aréna des Canadiens inc.*,^{[1](#)} dismissing a motion for authorization to bring a class action to claim payment of overtime under the *Act respecting labour standards* (the "Act") on behalf of employees paid on an annual basis.

In this decision, which is of interest to all employers in Quebec, the Superior Court (the "Court") confirmed the case law to the effect that the existence of a prevailing hourly wage is a condition for the application of overtime pay at a premium provided for in section 55 of the Act.

Context

The first plaintiff was a senior editorial coordinator at L'Aréna des Canadiens. Her duties included writing articles and conducting interviews on the Montreal Canadiens hockey team. To accomplish these tasks, she had to follow the team in Quebec, Canada and the United States during games and practices, outside of office hours.

The second plaintiff was an account manager at L'Aréna du Rocket and was responsible for promoting and selling season tickets, box seats and other packages for the games of the Rocket de Laval hockey team. To do so, he had to be present during Rocket hockey team games, outside of office hours.

Under their respective employment contracts, both plaintiffs were paid on an annual basis and their work schedules were determined by the needs of their respective positions. Given the plaintiffs' variable schedules, the defendants granted them leave based on their participation in games and other related activities.

Class action

The plaintiffs filed an application for authorization to bring a class action on behalf of all employees paid on an annual basis (with the exception of executives) who worked for the defendants at least one week of more than 40 hours in the year preceding the filing of the application in order to claim overtime pay at a premium under the Act.

In particular, the Court examined the following causes of action:

“ Remuneration of an employee on an annual basis does not allow an employer to evade the provisions of the Act regarding overtime pay at a premium, and in the alternative;

The control exercised by the defendants over the plaintiffs' hours of work makes it possible to determine the prevailing hourly rate for the purpose of calculating overtime pay at a premium.”

To authorize the class action, the Court had to determine whether the application met the criteria of Article 575 of the *Code of Civil Procedure* (the "CCP"). In this case, the Honourable Justice Lamarche dismissed the application for authorization on the basis of the criteria provided for in paragraphs 575(2) and 575(3) of the CCP, namely the criteria of an arguable case and the composition of the class.

No arguable case

The second criterion provided for in Article 575 of the CCP is satisfied when the "*facts alleged appear to justify the conclusions sought*", i.e., if there is an arguable case. The burden of the plaintiffs is low in this regard.

The Court then recalled the principle that a pure question of law must be decided already at this stage.

The first cause of action advanced by the plaintiffs sought to reject the courts' interpretation of section 55 of the Act, on the ground that this interpretation was not consistent with the purpose and other provisions of the Act.

From the outset, the Court pointed out that the case law of the lower courts is unanimous in holding that section 55 of the Act does not apply in the case of an employee remunerated on the basis of an annual salary. This case law confirms, however, that the annual salary cannot be merely artificial, that is to say that the employee must not in fact be paid according to the number of hours worked.

The Court followed the case law in the light of its own interpretation of the provisions in question. Indeed, the Court confirmed that the legislator's use of the term "*prevailing hourly wage*" in section 55 of the Act cannot simply be ignored. In the Court's view, the term is clear and indicates that a prevailing hourly wage is required to give rise to overtime pay at a premium. This expression is understood in its usual sense as remuneration varying according to the hours worked. However, an annual salary does not depend on the number of hours worked.

Moreover, such an interpretation is consistent with the other provisions of the Act. In fact, the Court held that sections 52 to 54 of the Act are used solely for the purpose of calculating overtime and that they cannot exclude the condition to their application provided for in section 55 of the Act, namely the existence of a prevailing hourly wage.

Finally, the Court pointed out that, although the primary objective of the Act is to protect employees, the legislator has reconciled such interests with the underlying economic concerns of employers. Indeed the Act does not impose hourly remuneration as a mandatory method of remuneration. The method of remuneration is at the discretion of the parties and each method of remuneration has its own specific characteristics.

The Court therefore concluded that the use of the term "*prevailing hourly wage*" in section 55 of the Act taken in its context and according to the purpose of the Act is indeed intended only for employees who are paid on an hourly basis. In the Court's view, the plaintiffs' cause of action, which is based on the application of section 55 of the Act to employees paid on an annual basis, is therefore not an arguable case.

The second cause of action advanced by the plaintiffs was that the defendants' control over their employees' hours of work made it possible to calculate a prevailing hourly wage.

The Court was of the view that the plaintiffs' allegations did not demonstrate control over the work schedule that would make it possible to determine a prevailing hourly wage based on the number of hours worked. The Court further stated that the plaintiffs had acknowledged that the hours were based on the needs of the position and varied from week to week, while their pay remained the same, regardless of the number of hours worked.

The Court therefore concluded that the allegations did not support the conclusions sought.

Composition of the class and special characteristics of individual employment relationships

According to the Honourable Justice Lamarche, the criterion provided for in Article 575(3) of the CCP, that the composition of the class must make it difficult or impracticable to apply the rules for mandates to take part in judicial proceedings on behalf of others or for consolidation of proceedings, was also not met.

In this regard, the Court followed the teachings of *Lachance c. Cleyne & Tinker inc.*,^[iii] where it was determined that this criterion had not been met in the context of an application for authorization to bring a class action claiming notice of layoff of former employees, as potential members were easily identifiable.

Furthermore, the Court considered the allegations of possible retaliation, anonymity and the disproportionate relationship between the amounts claimed and the costs of an individual action to be unfounded. On the contrary, the Commission des normes, de l'équité, de la santé et de la sécurité du travail (the "CNESST") may initiate an action at no cost on behalf of employees and has broad investigative powers to ensure compliance with the Act. Such an action is also more effective and heard on an urgent basis.

The Court concluded that the composition of the class did not meet the criterion of Article 575(3) of the Act in light of the plaintiffs' allegations, especially given the role and powers of the CNESST. The Court further stated in this respect that the principles of proportionality and sound administration of justice militated against the authorization of the class action.

Conclusions

Right at the authorization stage, the Honourable Justice Lamarche ruled on an important question of law to prevent a class action based on an erroneous legal syllogism from being authorized. This decision confirms and clarifies the courts' interpretation of section 55 of the Act, according to which a prevailing hourly wage is a condition for the application of overtime pay, in order to avoid attributing an excessive scope to section 55 of the Act and imposing a mandatory method of remuneration on employers.

Contrary to the prevailing tendency in recent years to limit the authorization of class actions to a mere formality, this decision rather reminds us that a class action remains an extraordinary procedure that is not always appropriate, in particular with regard to individual employment relationships. The decision also confirms that class actions are not the preferred procedural vehicle to enforce employees' rights, given the powers vested in the CNESST in this respect.

The plaintiffs have thirty (30) days to appeal the decision, should they so elect.

[ii](#) 2019 QCCS 1678.

[iii](#) 2006 QCCA 1612.

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