In an arbitration pursuant to the collective agreement

BETWEEN:

Unifor Local 6007

("the union")

And

Bell Canada

("the employer")

Re: Grievance of Shaheen Malgi (Grievance #200406)

For the Union:

Maeve Biggar
Sonny Malhotra
Fazal Vankalwala
Dayanand Sabhnani
Shaheen Malgi

For the Employer:

Maria Valente Fernandes
Howard Anderson

A video hearing was held on April 8, 2021.

AWARD

1. The grievance before me alleges that the employer breached the collective agreement and the Canada Labour Code ("the Code") by denying Shaheen Malgi ("the grievor") use of a paid personal leave day under the Code.

2. The dispute deals with the interplay between the recent amendments to the Code that provide for three paid days off (referred to as "Code days") and the grievor's entitlement to paid personal days under the collective agreement (referred to as "collective agreement days").

3. The parties prepared the following Agreed Statement of Facts:

AGREED STATEMENT OF FACTS

1. Unifor and its Local 6007 ("the Union") and Bell Canada ("the Employer") are parties to a collective agreement with a term of January 1, 2019 to December 31, 2022 covering Communications Sales employees ("the Collective Agreement"). A copy of the Collective Agreement is at **Exhibit 1**.

2. The present dispute relates to a grievance filed by the Union on February 19, 2020 (Grievance No. 200406) alleging that the Employer violated the Collective Agreement and the *Canada Labour Code* ("the *Code*") by denying Shaheen Malgi use of a paid personal leave day under the *Code*. A copy of the Grievance is at **Exhibit 2**.

3. Shaheen Malgi ("the Grievor") is a Bell Canada Full-Time Direct Marketing Associate working out of the Scarborough, Ontario office who is covered by the terms of the Collective Agreement. The Grievor has been continuously employed by the Employer since 2006.

4. In or around February 2020, the Grievor made a request to her manager, Aurora Mazzulla Coletta, to take a paid personal leave day pursuant to s. 206.6 of the *Code* in order to bring her husband to an upcoming doctor's appointment, as he could not attend independently due to his medical condition.

5. At the time of Ms. Malgi's request as set out in paragraph 4 above, Ms. Malgi had not requested or used any personal leave days pursuant to s. 206.6 of the *Code* or any personal days pursuant to Article 10 of the Collective Agreement on any prior occasions in the 2020 calendar year. Similarly, Ms. Malgi had not taken any leave due to illness in the 2020 calendar year.

6. Ms. Coletta advised the Grievor that, after consulting with Human Resources, she determined that the request to use a personal leave day under the *Code* was denied. Ms. Coletta advised the Grievor that if the Grievor wanted to take a day off for one of the reasons listed under 206.6 of the *Code*, the Grievor would first have to use one of the four (4) personal days available to her under Article 10 of the Collective Agreement to take her husband to his appointment. The Grievor declined this alternative and ultimately made other arrangements for her husband's appointment and did not take the day off work.

7. There is no dispute between the Parties that the reason underlying the Grievor's request to use a personal leave day constitutes "carrying out responsibilities related to the health or care of any of their family members" within the meaning of subsection 206.6(1)(b) of the *Code*.

8. It is the Union's position that the Employer's denial of a paid personal leave day to the Grievor in the circumstances constitutes a violation of *inter alia* sections 206.6 and 168 of the *Code* and Articles 10 and 27 of the Collective Agreement. It is the Union's position that the Grievor was rightfully entitled to a paid personal leave day pursuant to subsection 206.6 of the *Code* in the circumstances and that she was not obliged to make use of her allotted personal days under Article 10 of the Collective Agreement before accessing a personal leave day under the *Code*. The Union takes the position that the Employer's requirement that the Grievor use a personal day under the Collective Agreement, rather than a personal leave day under 206.6 of the *Code*, was contrary to section 168(1) of the *Code* and further constitutes an unreasonable exercise of management rights.

9. The Employer takes the position that the Grievor was not denied a personal day under 206.6 of the *Code.* The Grievor was permitted to take a personal day to accompany her husband to his medical appointment and as such, there was no violation of section of 206.6 of the *Code*. It is also the Employer's position that the Personal Days under Article 10 of the Collective Agreement can be taken for any of the reasons listed at 206.6 of the *Code,* at any time, without the need to provide prior notice or written justification, except in regards to 206.6(4). Consequently, the Employer's position is that it can deduct the Grievor's Personal Day under Article 10 the Collective Agreement, and this does not constitute any violation of the Collective Agreement or the *Code*. The *Code* provides for a minimum standard, and there has been no breach of the *Code's*

minimum standards or the provisions in the Collective Agreement. The Employer does not take the position that employees have to exhaust all of their vacation time prior to taking a day off for one of the reasons listed under 206.6 of the *Code.* The Company will elaborate on its position and arguments at the hearing.

The Collective Agreement

4. The relevant provision of the collective agreement reads as follows:

> **10.08** Personal Unpaid Days
>
> Each employee holding a Direct Marketing Associate – **Consumer Market** or Direct Marketing Associate – Loyalty Resolution or Team Coordinator occupation with one (1) year of completed net credited service shall be granted up to four (4) personal unpaid days off. It is agreed that these personal unpaid days off will be scheduled and taken during the period January 1st through December 31st. It is understood that once an employee has completed one (1) year of net credited service, the personal unpaid days will be pro-rated and scheduled subject to business needs.
>
> The time off shall be granted subject to the following:
>
> - The Company will prepare a schedule to reflect the above period outlined in Section 10.08
>
> - The four (4) personal unpaid days described above can only be taken in half (1/2) tours of duty or full tours of duty, subject to service requirements;
>
> **10.09** Two (2) of these personal unpaid days referred to in Section 10.08 may be used from January 1st through December 31st inclusively, as required, for personal emergencies.
>
> **10.10** Unused personal unpaid days will not be carried over from one year to the next.
>
> **10.11** An employee may choose not to avail themselves in the unpaid personal day schedule. Once the scheduling has been completed, if an employee decides to avail themselves, the employee's unpaid personal days will be pro-rated against the applicable time remaining in the year. The employee will select their unpaid personal days from the available days remaining on the schedule. Seniority rights will not apply.
>
> **10.12** Each employee with 24 months of completed net credited service or more, may have one (1) of their personal unpaid days as described in Section 10.08,

converted to one (1) paid day off. Pay for this time off will be at the employee's basic rate of pay. The scheduling of this day will be subject to the terms and conditions of Section 10.08 in the following year.

5. The collective agreement provides the grievor with four unpaid days off each year to be scheduled subject to business needs. The days off can be taken as half day tours. Two of the days off may be used for personal emergencies. Otherwise, there are no restrictions on the use of these days. Employees may use their personal days for any reason, such as rest or pleasure.

6. For employees with 24 months of completed net credited service, one personal day may be taken as a paid day off. Again, there is no specific restriction on the personal day other than the scheduling of the paid day is subject to business needs. It is essentially a paid day off and the employee does not have to provide a reason.

Canada Labour Code

7. Pursuant to s. 206.6(1) of the Code, employees are entitled to a leave of absence from employment of up to five days in every calendar year for specific reasons. The section reads as follows:

> 206.6 (1) Every employee is entitled to and shall be granted a leave of absence from employment of up to five days in every calendar year for
>
> (a) treating their illness or injury;
>
> (b) carrying out responsibilities related to the health or care of any of their family members;
>
> (c) carrying out responsibilities related to the education of any of their family members who are under 18 years of age;
>
> (d) addressing any urgent matter concerning themselves or their family members;
>
> (e) attending their citizenship ceremony under the *Citizenship Act*; and
>
> (f) any other reason prescribed by regulation.
>
> (2) If the employee has completed three consecutive months of continuous employment with the employer, the employee is entitled to the first three days

of the leave with pay at their regular rate of wages for their normal hours of work, and such pay shall for all purposes be considered to be wages.

8. Under subsection 206.6(2), an employee who has completed three consecutive months of continuous employment is entitled to the first three days of the leave with pay at their regular rate of wages for their normal hours of work.

9. There are other restrictions on the use of these days. Although the leave of absence may be taken in one or more periods, the employer may require that each period of leave be of not less than one day's duration. The employer may also request that the employee provide documentation to support the reasons for the leave and the employee is obliged to provide such documentation if it is reasonably practicable to obtain and provide it.

The positions of the parties

10. The positions of the parties, as described in the Agreed Statement of Facts, were elaborated on during the course of the hearing.

11. The union argues that the grievor ought to be allowed to use the collective agreement days without restriction as negotiated in the collective agreement. As the grievor had a statutory right to use a Code day to take her husband to a personal appointment, she ought to be permitted to use that day without impacting her entitlement under the collective agreement. It argues that the employer's insistence that she utilize her collective agreement days is tantamount to imposing a restriction and not supported by any provision in the collective agreement or the Code. Similarly, the employer's requirement of deducting a collective agreement day is not supported in the collective agreement or by the Code.

12. The union further argues that the employer's position could lead to an inequity depending on when employees needed to use their Code days. For example, if an employee was forced to use a Code day on her first request for a personal day and that a collective agreement day was deducted (as argued by the employer), she may never use another Code day for the rest of the year. Contrast that with the circumstance where an employee requests a collective agreement day for rest, and thus does not qualify for the Code day. That employee would be entitled to more paid days off simply because of the order in which her need arose. The union argues that this would be an absurd result that is entirely avoidable.

13. The union referred me to the following cases: *Champagne v. Atomic Energy of Canada Limited*, 2012 CanLii 97650 (Roach); *I.A.M. & A.W., Lodge 771 v. Abitibi-Consolidated Co.*, (2006), 151 L.A.C. (4th) 229 (Jesin); *Carillion Services Inc. and LIUNA, Local 183 (Williams)*, 2018 CarswellOnt 8854 (Rogers); *Tembec Inc. and USW, Local 1-2010 (Personal Emergency Leave)*, 2018 CarswellOnt 18483 (Tims). It recognized that the cases are not

on all fours as they dealt with provincial entitlements and involved a greater right or benefit analysis.

14. The employer argues that there was no violation of the collective agreement because the grievor was permitted to take the day off with pay. It takes the position that it is entitled to combine the calculation of the Code days with the collective agreement days that are available to the grievor. Thus, the grievor is only entitled to a total of three days with pay, whether they be Code days or collective agreement days.

15. The employer referred to *Moday and Bell Mobility Inc.,* [2013] C.L.A.D. No. 48 (Abramsky) and Interpretations, Policies and Guidelines (IPGs) Stacking – Canada Labour Code, Part III- Division 7 – 801-1-IPG-099.

Analysis

16. Having carefully considered the facts and submissions of the parties, I conclude that the grievance must be allowed.

17. I start by recognizing that the restriction imposed by the employer on the use of collective agreement days is not found in the collective agreement or the Code. There is no provision in either the collective agreement or the Code that stipulates that the employee must first use the collective agreement day before having access to the Code days or that the employer is entitled to deduct the collective agreement day from the Code days. This is a requirement stipulated by the employer after the Code was amended to include the entitlement to paid Code days.

18. The analysis of the grievor's entitlement to Code days is informed by s. 168(1) of the Code. This section distinguishes the entitlement under the Code from other entitlements under the collective agreement by stating that it does not affect contracts of employment providing for more generous benefits. The section reads as follows:

> 168 (1) This Part and all regulations made under this Part apply notwithstanding any other law or any custom, contract or arrangement, but nothing in this Part shall be construed as affecting any rights or benefits of an employee under any law, custom, contract or arrangement that are more favourable to the employee than his rights or benefits under this Part.

19. Thus, the entitlement to Code days applies notwithstanding any collective agreement benefit and nothing in that Part of the Code affects the grievor's benefits under the collective agreement.

20. In *Prosper v. PADC Management Co.*, [2010] C.L.A.D. No. 430 (Campbell) the adjudicator made the following observation regarding the party's ability to contract out of the rights or benefits in respect of s. 168(1) of the Code:

> I believe the section is clear in stating that you cannot contract out of the Code and the intent of that section is to say that if there are any provisions in a contract or other custom that are more favourable, this section does not prevent an employee from being entitled to those rights and benefits, as well as the rights and benefits they are entitled to under the Code.

21. This observation was affirmed by Arbitrator Roach in *Champagne v Atomic Energy of Canada Limited*, 2012 CanLII 97650 (CA LA), where he stated:

> It is evident that section 168(1) of the Code mirrors the object of minimum employment standards legislation that it imposes a level of benefits or rights as it relates to working conditions and benefits but does not effect in any manner benefits that are more favourable to an employee. Accordingly, I am of the view that the Complainant may fully benefit from the provisions of 240-246 since the parties may not contract out of the said provisions.

22. These remarks apply in the circumstances before me. Pursuant to s. 168(1) of the Code, the benefits provided under s. 206.6 are not affected by, nor do they affect, the collective agreement entitlements available to the grievor.

23. If the language of the Code were not clear enough, section 168(1.1) of the Code, which precludes the application of certain parts of the Code where a collective agreement confers benefits that are at least as favourable, has no application. That section refers to Divisions II, IV, V and VIII, yet the paid CLC days fall under Division VII. There is no support for the employer's position in s. 168(1.1) of the Code.

24. The employer has referred to the IPG dealing with stacking of personal days. While it was acknowledged that the IPG is not binding on my authority as an arbitrator, it argued that the IPG should be given some weight as an interpretative guide.

25. After carefully review of the IPG, I must conclude that it does not assist the employer's case. The IPG stipulates that an employee whose collective agreement provides for five or more days of personal leave (including at least three days with pay) are not entitled to additional personal leave under the Code if certain conditions apply. The grievor is only entitled to four personal days under the collective agreement with one of those days being a paid day off. Thus, the stipulation set out in the IPG does not apply.

26. Similarly, the example set out in the IPG that was relied upon by the employer does not apply. The example deals with an employee who is covered by a collective agreement that grants her six days of "employee health leave". In the first scenario, the employee has already taken five days of employee health leave. The IPG stipulates that the employee is not entitled to any personal leave under the Code. In the second scenario, the employee has taken two days of employee health leave. The IPG stipulates that the employee would be entitled to one paid day of personal leave under the Code and two days without pay. In the third scenario, the employee has taken no employee health

leave. The IPG stipulates that she would be entitled to five days of personal leave under the Code, the first three of which must be paid. The IPG further states that her entitlement to employee health leave would be subject to the collective agreement.

27. The example in the IPG has no application to the facts before me as the grievor was not entitled to five or more days of personal leave under the collective agreement. The grievor was entitled to four days off with only one of those days with pay. Thus, even if I were to give any weight to the IPG (for which I was given no authority that I ought to do so), I find that the IPG is not applicable to the circumstances before me.

28. The union argued that the analysis that I must apply is a comparison of the two types of leaves of absences. It argued that the purpose of the Code days was different than the collective agreement days. Thus, there was no basis for the employer to force the grievor to take her collective agreement day and deduct that day from her entitlement under the Code. The employer did not take issue with this analysis. It argues that this analysis leads to the opposite conclusion since the purposes of the two entitlements are the same, or at least, significantly overlap.

29. The parties reviewed a series of cases that arose in Ontario dealing with the personal leave entitlements under the Employment Standards Act, 2000 ("ESA"). While the cases deal with the "greater right or benefit" analysis, there are analogous principles that have some application.

30. In *Carillion Services Inc. and LIUNA, Local 183 (Williams)*, 2018 CarswellOnt 8854 (Rogers) the issue was whether the two paid days provided by the ESA could be counted when employees took their paid floater days that were provided for under the collective agreement.

31. The arbitrator found that the application of floater days to an employee's request for time off was neither automatic nor mandatory. Rather, an election was reserved to the employee. Arbitrator Rogers concluded as follows:

> Article 17 entitled each of the grievors to nine named "paid holidays" and three additional paid holidays, identified as floater days. The floater days are not reserved for or available only in circumstances that would entitle an employee to paid personal emergency leave under the ESA. If an employee put the floater days to that use (or, as here, was deemed by the Employer to have done so), he or she would be giving up holidays to which he or she was entitled under the collective agreement. In effect, the employee – and not the Employer – would be paying for paid statutory personal emergency leave days by foregoing paid holidays. In that scenario, the contractual benefit to be placed on the scale would have the characteristic of being funded by the employee whereas the statutory benefit is available at no expense to the employee. Looked at from that perspective, the statutory benefit tips the "metaphysical scale": it cannot be said that the elements of the collective agreement presented by the Agreed Facts "provide a greater

benefit to an employee than the employment standard". To the contrary, absent a negotiated requirement that the floater days be reserved for the purposes of providing the equivalent of three personal emergency leave days with pay – in which case the floater days would lose all value as "holidays" – they cannot be withheld or applied by the Employer as the means by which its obligations to provide paid leave under subsections 50(5)and (8) are to be satisfied.

32. This conclusion is consistent with the finding in *I.A.M. & A.W., Lodge 771 v. Abitibi-Consolidated Co.*, (2006), 151 L.A.C. (4th) 229 (Jesin) where the grievor was required to take three days off work to attend to the medical needs of his daughter, which qualified for the emergency leave provisions under the ESA,(as it was at the time). The employer treated the days taken as floating holidays with the result that the grievor lost three days from his holiday bank. The grievance sought the reinstatement of the three days holiday entitlement.

33. Arbitrator Jesin noted that arbitrators "…have been careful to ensure that they are comparing 'apples to apples' when comparing benefits to determine whether the collective agreement provides a greater benefit than the ESA". He distinguished the floating holidays and statutory personal emergency leave as follows:

> 16. In addition . . . the floating holidays in our case are set out as a subsection in an article entitled "Holidays". Indeed . . . the floating holiday provision is described under the heading "additional paid holidays". The floating holidays and the shutdown days are both treated as holidays, in my view. There are similar qualifying provisions for payment – that is the employee must work the day before and the day after both the shutdown holiday and the floating holiday. . . .
>
> 17. S. 50 of the ESA, on the other hand [*sic*] is clearly not a holiday provision. It is a provision entitling employees to time off work to deal with specified personal or family emergencies. I agree with cases such as *Metropolitan Toronto Zoo* [*v. C.U.P.E., Local 1600* (2001), 102 L.A.C. (4th) 397] which suggest that one must be sure that benefits are of the same type before they can be compared under s. 5(2) of the ESA. In my view, the floating holiday cannot be considered in comparing whether the basket of leave benefits in the collective agreement are greater than those under s. 50 of the ESA.
>
> . . .
>
> 19. . . . In my view, holidays and emergency leave are of different subject matters – apples and oranges – and I do not think that an employee should be forced to reduce his/her holiday entitlement in order to receive emergency leave.

34. Arbitrator Jesin ordered the reinstatement of three floating holidays to the grievor's holiday bank.

35. Similarly, Arbitrator Nyman dealt with the interplay between "floater days" and emergency leave in *Cargill Value Added Meats London and UFCW, Local 175,* [2015] Carswell Ont 7405 (Nyman). Following a review of the caselaw, Arbitrator Nyman identified the following principles from the authorities:

> 48. . . . [I]t appears to me that following principles generally flow from the above cases with respect to when a collective agreement benefit offsets the [emergency leave] day entitlement:
>
> > a) If the benefit or benefits in the collective agreement do not directly relate to the [emergency leave] day employment standard benefit, the employee is entitled to both the collective agreement benefit and the [emergency leave] day employment standard;
> >
> > b) If the benefit or benefits in the collective agreement directly relate to the [emergency leave] day employment standard benefit, the employee's entitlement to the [emergency leave] day employment standard may be fully or partially reduced accordingly; and,
> >
> > c) Unless the collective agreement as a whole or a specific provision supersedes the [emergency leave] day provisions entirely (and thereby eliminates the right of the employees to the benefit of section 50 of the Act), it is only when an employee actually claims the benefit or benefits in the collective agreement (such as bereavement leave) that directly relate to the [emergency leave] day employment standard benefit, that their [emergency leave] day entitlement is reduced. In such cases the employer may grant the collective agreement benefit that directly relates to the [emergency leave] day right and count that leave towards the employee's allotment of ten [emergency leave] days per year; however, there is no reduction in [emergency leave] days if the benefit is not claimed at some point during the year.
>
> 49. I also find that the foregoing cases establish that with respect to [emergency leave] days in particular the question as to whether a collective agreement benefit directly relates to the [emergency leave] day employment standard is, for the most part, answered by reference to the purpose of the two benefits. . . .

. . .

> 56. I agree with the arbitrator in *Abitibi* . . . that paid holidays serve a different purpose than emergency leave. Emergency leave is designed to ensure an employee can be absent from work without fear of reprisal to attend to a personal or family emergency. Holidays are designed to provide a day of rest from work without monetary loss. These are different purposes and Holidays do not directly related [*sic*] to [emergency leave] days. I therefore find that Cargill cannot reduce an employee's [emergency leave] day entitlement by the number of Floater days to which he or she is entitled under the Collective Agreement.

36. Returning to the case before me, the collective agreement days are not contingent on a specific reason. Employees can take collective agreement days for any reason, including leisure or rest. Although these days are subject to the scheduling provisions as outlined in Article 10.08, two of the days can be used as required for personal emergencies. For employees with 24 months net credited service, one of those days can be converted to a paid day off. It is clear that the purpose of the collective agreement days is to allow employees to take days off (either in full or partial tours) as they see fit as broad as that might be in favour of the employee. These days are akin to vacation days, floater days or lieu days in that the employee is not required to provide a reason for taking the day off.

37. In contrast, the Code days have restrictions and are clearly intended to provide time off for specific circumstances as outlined in s. 206.6(1) of the Code. The employer may request documentation to support the reasons for the leave. These days are for limited purposes with specific scheduling requirements and proof of eligibility.

38. While there may be overlap in the two leaves, the Code days do not replace the collective agreement days. They are separate entitlements for different purposes and there is nothing in the Code or the collective agreement that allows for a different interpretation. To use a phrase applied in the Ontario line of cases, they are apples and oranges. The effect of the employer's decision was to remove the grievor's discretion to take the collective agreement day at a time desired by the grievor with the effect of eliminating one of the grievor's entitlements under the Code. What was negotiated as a day of rest for the grievor was unilaterally converted by the employer to a Code day. I reach the same conclusion as Arbitrator Nyman in *Cargill Value Added Meats* and Arbitrator Rogers in *Carillion Services*, that the employer had no right to unilaterally change the meaning or intent of a collective agreement provision – to transform a day of rest as determined by the employee into a Code day.

39. In my view, the floater days such as these are not equivalent to and do not directly relate to the personal days under the Code. I reach the same conclusion as the arbitrator in *Abitibi-Consolidated* in that I do not think that an employee should be forced to reduce his/her collective agreement day entitlement in order to receive Code days.

40. Thus, when the employer denied the request for a Code day and insisted that the grievor use a collective agreement day to take her husband to a medical appointment, the

employer impinged on the grievor's entitlements without justification. This was a violation of the collective agreement and sections 206.6 and 168 of the Code.

41. For these reasons, I declare that the employer violated Articles 10 and 27 of the collective agreement and sections 168 and 206.6 of the Code.

42. The parties made no submissions on the remedial relief beyond a declaration. In the circumstances it does not appear that any further remedies, beyond a declaration, is appropriate. However, I remain seized in the event that there is a dispute about the appropriate remedial relief.

Dated in Whitby, Ontario this 2nd day of June, 2021.

Matthew R. Wilson
Arbitrator