

Docket: 2002-1550(EI)
2002-1552(EI)

BETWEEN:

KIRANPAL K. SANDHU,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeals heard on December 5, 2002 at Vancouver, British Columbia,

Before: The Honourable Deputy Judge D.W. Rowe

Appearances:

Counsel for the Appellant: Avtar Dhinsa

Counsel for the Respondent: Nadine Taylor Pickering

JUDGMENT

The appeal 2002-1552(EI) is dismissed and the decision of the Minister is confirmed.

The appeal 2002-1550(EI) is allowed and the decision of the Minister is varied in accordance with the attached Reasons for Judgment.

Signed at Sidney, British Columbia, this 27th day of February 2003.

"D.W. Rowe"

D.J.T.C.C.

Citation: 2003TCC75
Date: 20030227
Docket: 2002-1550(EI)
2002-1552(EI)

BETWEEN:

KIRANPAL K. SANDHU,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Rowe, D.J.T.C.C.

[1] The appellant appeals from two separate decisions issued by the Minister of National Revenue (the "Minister"). Counsel for the parties agreed that the two appeals could be heard together and the Respondent's Book of Exhibits containing documents at tabs 1-6, inclusive, 12-15, inclusive, and at tab 20, be filed as Exhibit R-1. Reference to a tab number will signify the documents are to be found within said exhibit.

[2] The Minister issued a decision – dated January 29, 2002 – wherein it was decided the employment of the appellant Kiranpal K. Sandhu (Sandhu or worker) with Param R.S. Malhi (Malhi or payor) during the period of July 6 to October 24, 1998 was not insurable employment pursuant to the relevant provisions of the *Employment Insurance Act* (the "Act") because she was not employed under a contract of service. This decision is the subject of appeal 2002-1550(EI)

[3] The Minister issued a decision – dated January 28, 2002 – wherein it was decided the employment of Sandhu with Manjit S. Grewal (Grewal) and Jasvir S. Dhaliwal (Dhaliwal) during the period of August 3 to November 6, 1999 was not insurable employment pursuant to the *Act* because she was not employed under a contract of service. This decision was the subject of appeal 2002-1552(EI).

[4] Russel Gill, a qualified interpreter in the Punjabi and English languages, interpreted the testimony of Kiranpal Kaur Sandhu. Sandhu is a farm worker residing

in Osoyoos, British Columbia. She arrived in Canada - in 1993 - after having completed Grade 11 in India. She lived in Winnipeg, Manitoba prior to moving to Osoyoos - in 1995 - where she found jobs in a packing house and at a fast food outlet. She stated she began working for Malhi and remained until October. During that period, she worked at thinning, driving tractor to move bins, and re-locating irrigation equipment. Sandhu stated her husband - Charanpal Sandhu - had held certain discussions with Malhi concerning an opportunity for employment and had obtained a \$3,000 cheque from Malhi on March 14, 1998 as an advance against her future wages. Her rate of pay was set at \$10 per hour including vacation pay. Malhi had two other workers - not related to him or his family - and was a grower of peaches, pears and apples on an orchard located in Oliver, B.C., a 15-minute drive from the appellant's residence. The appellant stated she and other workers started work early in the morning so when the heat became oppressive later in the day they could leave. On occasion - during the cooler evenings - she would return to work for a few hours. At tab 1, the appellant identified her Record of Employment (ROE) issued by Susan Kassian (Kassian) indicating she had 742 insurable hours with \$7,420 in insurable earnings during the period of July 6 to October 24, 1998. Sandhu identified her application for Employment Insurance (EI) benefits - tab 2 - which had been completed by her husband. She reviewed the contents and signed it. At page 3 of tab 4, the appellant was referred to a photocopy of a cheque - dated March 14, 1998 - originally payable to Puneet Orchard but that name had been crossed out and the payee - Kiranpal Sandhu - had been substituted. The appellant stated Malhi had made that correction when he issued the cheque. She received another cheque - from Malhi - in the sum of \$1,500 on December 4, 1998 because she needed money in order to travel to India. At tab 5, the appellant identified a cheque dated June 16, 1999 - payable to Puneet Orchards - with the notation that it was in respect to "Pay Roll 98". The appellant's son was born in 1995 and her husband received assistance from her brother and sister - who were living with them in Osoyoos - in caring for the child. Puneet Orchard - sometimes appearing in documents as Puneet Orchards - was the name used by her husband - Charanpal Sandhu - to operate his orchard business but she stated she was not part of that enterprise. During her employment with Malhi, she had not maintained any record of hours worked other than as recorded on a calendar which she used as the basis for calculating her total hours each week in order that Malhi could use this number for purposes of his payroll records. In 1999, the appellant stated she did not return to work for Malhi but found employment with Dhaliwal and Grewal at an orchard in Oliver. She did pruning, thinning and picked and packed peaches and apples, some of which were of a late-fall variety. Her rate of pay was \$10 per hour and she worked 6 or 7 days per week. Her husband lived in Osoyoos and continued to operate Puneet Orchard. Her ROE - tab 12 - pertaining to her employment with Grewal/Dhaliwal was issued by Susan

Kassian on November 5, 1999 and stated her insurable hours were 728 with earnings in the sum of \$7,280 since August 3, 1999. The appellant had applied for EI benefits – tab 13 – and she identified her signature on said application. The appellant stated she received her total wages – in the sum of \$6,872.56 - by cheque – tab 14 – dated December 7, 1999 issued by J.S. Dhaliwal. At tab 15, the appellant identified a list of her working time as maintained by her employers. She did not retain any personal record of hours worked. The appellant stated she worked at an hourly rate using all the tools and equipment supplied by her employers – whether Malhi in 1998 or Grewal and Dhaliwal in 1999 – and was not related to any of those individuals.

[5] In cross-examination, Kiranpal Sandhu stated she had never attended school while living in Osoyoos and had not been a partner in Puneet Orchard – operated by her husband – although she had signed for a mortgage which had been required to raise capital for the business, as well as some business cheques and an ROE issued to a Puneet Orchard employee. In 1998, Sandhu denied counsel's suggestion that Puneet Orchard had employed Malhi's sister-in-law. Since 2001, the appellant stated she now operated the 45-acre parcel of land comprising Puneet Orchard because she and her husband separated and he now resides in Winnipeg. In prior years, the appellant stated her husband would travel to Winnipeg in December to work as a taxi driver during the winter months and would return to Osoyoos in order to work at the orchard during the summer. With respect to her employment with Malhi – in 1998 – Sandhu stated he had issued her a T4 slip stating her net earnings were in the sum of \$5,774.54. Before going to work for Malhi – on July 6, 1998 – the appellant had been receiving EI benefits which had expired just two days earlier. The appellant explained the care of her child was shared between her husband - who took the infant with him into the fields - and her brother and sister-in-law who helped him after returning from school. In completing the Questionnaire – tab 10 – dated December 17, 2001, she referred to duties performed by her as thinning, picking and packing fruit and changing irrigation but there was no mention of driving a tractor. At paragraph 3(b) of said Questionnaire, the place where her duties were performed had been incorrectly entered as 33625-95 St., Oliver, B.C., the address for Puneet Orchard. Sandhu stated she worked 7 days per week with the exception of a day off now and then. In the Questionnaire – at paragraph 6 – the appellant agreed she had responded to questions concerning work patterns by stating she worked – most of the time - from Monday to Saturday, between 7:00 a.m. and 4:00 p.m. The appellant was referred to a letter – Exhibit R-2 – signed by her - in which it states she had asked Malhi to "make the cheque payable to Puneet Orchard. I did not know that it would be a problem, it was easier for me to deposit the cheque if it was payable to Puneet Orchard". Sandhu stated she did not recall when that letter was written or by whom. She stated the cheque – at tab 4 – in the sum of \$3,000 – dated March 14,

1998 – was an advance against future earnings. This did not strike her as unusual because Puneet Orchard would also have provided a salary advance to a worker, if required. After beginning work for Malhi in July, she received small amounts of cash which she used to buy gas for her vehicle in order to drive to and from work. Sandhu recalled requesting Malhi to issue her final cheque – dated June 16, 1999 - in the sum of \$1,200 – in the name of Puneet Orchard. In Sandhu's opinion, someone had added – later – the notation "Pay Roll 98" because it was present when the cheque was written. She received the total sum of \$5,700 from Malhi, in the form of three cheques together with a further amount of cash which she had not bothered to record. In 1998 and 1999, the appellant stated she had not been involved in the management of Puneet Orchard but was aware of most of the cheques issued in respect of the operation of the business. Malhi had informed the appellant that he would not be able to pay the balance of her wages until June, 1999, more than 7 months following the termination of her employment. Sandhu stated Malhi supervised her work and the Puneet Orchard employee who earned approximately \$6,000 working for Puneet Orchard - during the summer of 1998 – was not related to Malhi. Turning to the second period of employment with Grewal and Dhaliwal, the appellant stated she had worked at their Orchard at Oliver, B.C. between August 3 and November 6, 1999, even though her ROE shows November 5 as her last day. She had been receiving EI benefits until July 3, 1999. Sandhu recalled there had been an investigation into circumstances surrounding the issuance of ROEs – by Puneet Orchard – but denied she had ever signed any ROEs or related documents but had limited her participation to recording hours of work. Counsel questioned the appellant concerning her activity in completing ROEs that were fraudulent together with her compliance in participating in an activity designed to receive EI benefits to which she was not entitled. The appellant responded that she could not remember paying any fines or administrative penalties in connection with any investigation. Sandhu stated she cannot recall having issued an ROE to Jasbal Sandhu in 1998, 1999 and/or 2000. She was not sure whether she had assisted him to complete an EI benefits application form but may have deposited some of his EI cheques in her personal account or in the business account of Puneet Orchard. Again, when questioned by counsel as to whether she had paid a penalty in the sum of \$5,912 – in relation to her conduct concerning EI procedures – the appellant stated she did not remember receiving notice of any penalty as described. Sandhu agreed she had signing authority on the Puneet Orchard bank account as at August 5, 1997 (Exhibit R-3). On November 9, 1999, the appellant submitted her own application for EI benefits – tab 13 – relating to her recently concluded employment. As for her duties at the orchard operated by Grewal and Dhaliwal, the appellant stated she did thinning, picking and packing of peaches, prune plums, apples and some apricots. She did not recognize the names of Harminder Kaur Gill, Amerjit Singh Gill or

Ranjit Kaur Gill as fellow workers at that particular orchard. During the winter of 1998-1999, the appellant stated her husband had again worked - as a cab driver - in Winnipeg. As late as November, Sandhu stated she was engaged in cleaning up the orchard and pruning peaches. In October, there had been some late apples to pick and she had also done some pruning. Sandhu stated she could not recall having told a Canada Customs and Revenue Agency (CCRA) interviewer that she began work at 7:00 a.m. nor did she recollect a conversation with another interviewer - a few months later - during which she was alleged to have stated she had started at 8:00 a.m. each day. Sandhu identified her signature on a letter - Exhibit R-4 - dated November 15, 2001- directed to the Chief of Appeals at CCRA - in which she expressed her desire to appeal the decision of the Minister disallowing her EI benefits relating to the period of August 3 to November 6, 1999. The letter went on to state, "I did work for Manjit Singh Grewal and Jasvir Singh Dhaliwal and I was paid cash for the work." The appellant was directed to examine - at tab 14 - a cheque dated December 7, 1999 - in the sum of \$6,872.56 - payable to herself. Sandhu stated she thought this cheque had been deposited into the Puneet Orchard business account and did not know why she had referred to receiving her wages in cash when sending the letter of November 15, 2001 to the Chief of Appeals. The appellant was referred to a photocopy - Exhibit R-5 - of an extract from the Puneet Orchard statement at the Osoyoos Credit Union which indicated that a cheque - in the sum of \$6,037.52 - had been cleared through the account on December 10, 1999 followed by a cash withdrawal on December 15, 1999 in the sum of \$5,600. The appellant stated she was still living with her husband in December, 1999 and he was in charge of operating the orchard business. At the Grewal/Dhaliwal orchard, the appellant stated Dhaliwal supervised most of the work. She also recalled working with Dhaliwal's sister for only a few weeks.

[6] In re-examination, the appellant identified the Questionnaire - tab 20 - she had completed on December 20, 2001.

[7] Charanpal Sandhu testified he came to Canada in August, 1990, lived in Winnipeg until the end of 1994, then moved to Oliver, B.C. where he lived until 1997 until he took up residence on the leased orchard land in Osoyoos. Currently, he works as a taxi driver and truck driver in Winnipeg after moving there in June, 2001. He started the Puneet Orchard business in 1996 and operated it by himself until June, 2001 when he turned it over to his wife - the appellant - following their decision to separate. Charanpal Sandhu stated that until he left the marital home, the appellant had not participated in the management of the orchard business and he had hired employees to work on the property, probably 4 or 5 at the beginning - in 1996 - and 7 or 8 during the 2000 season. He stated the appellant had not been granted signing

authority on the business bank account but had been required to sign documents for a loan because the Credit Union requested additional security before it would advance a line of credit. Charanpal Sandhu stated he knew Param Singh Malhi but was not related to him nor was he related to Manjit Grewal and/or Jasvir Singh Dhaliwal. During the growing seasons of 1998 and/or 1999, he denied having employed Malhi's sister-in-law because – to his knowledge - Malhi had no such relative. Charanpal Sandhu stated he was living in Osoyoos and recalled the appellant worked for Malhi – in 1998 - at the orchard in Oliver. In 1998, he had not gone to Winnipeg - in the winter - to drive taxi and had not returned there until around Christmas, 1999, in order to work. Their child had been born in 1995 and he took care of the infant while the appellant worked away from their home - in 1998 - and also in 1999 when she worked for Grewal and Dhaliwal.

[8] In cross-examination, Charanpal Sandhu reiterated he had not visited Winnipeg - in 1998 - and had operated Puneet Orchard during that year and throughout the growing season of 1999. He stated he had not granted authority to the appellant to sign cheques on behalf of Puneet Orchards or to complete any ROEs for workers. During the evenings, she may have helped out from time to time after finishing her own workday elsewhere. Many employees were paid in cash and issuing documents such as ROEs were his responsibility. The 45-acre orchard operated by Puneet Orchard required his attention to various matters including the sale of fruit to the cooperative. On occasion, he stated he would buy small quantities of fruit from other farms in order to sell to peddlers if he did not grow some particular varieties on his own property. For example, if he had sold Puneet Orchard peaches to one of the many peddlers who operated fruit stands in the area and someone also wanted a small amount of cherries, he would obtain the cherries from an outside source and supply them - together with the peaches – to the customer. In 1998, he stated he was responsible for the care of their three-year-old son and when the appellant's sister returned from school she would assist him in caring for the child. Charanpal Sandhu was referred to a cheque – at tab 9 – dated December 10, 1999 – in the sum of \$6,037.52 - drawn on the Puneet Orchard account in favour of Malhi. He stated the cheque may have been in payment of juice apples and peaches he had purchased from Malhi and agreed there was no notation on the cheque to assist in determining the purpose of the payment. He recalled speaking with Brian Lundgren, investigator with Human Resources Development Agency (HRDC), on several occasions but could not confirm whether he had held a conversation with Lundgren early in the morning of June 28, 2001. Lundgren recalled talking with Malhi – early in 1998 – before the appellant began working on his farm. He asked Malhi for some financial assistance and Malhi subsequently issued a cheque in the sum of \$3,000 as an advance against the appellant's future wages. At tab 9, Charanpal

Sandhu was referred to a sheet listing certain fruit – apparently purchased from Malhi – for a total of \$6,038.52. However, he stated he had not prepared that document. Charanpal Sandhu could not recall the number of workers at Puneet Orchard during 1998 and 1999 but stated the work force would expand during picking time. He could not recall whether Harminder Kaur Gill worked for him but if a ROE or other document had stated the appellant had been her supervisor that information would have been incorrect. He could not recall whether Amarjit Singh Gill had worked for him. He permitted the appellant to deposit her pay cheques into the Puneet Orchard account and would often withdraw cash from the account in order to pay wages to employees. He could not recall the purpose for the withdrawal of the sum of \$5,600 on December 15, 1999 but had deposited the appellant's pay cheque – dated December 7, 1999 – in the sum of \$6,872.56 – received on her behalf from Malhi, since the appellant was in India at that time. Probably, that cheque was included in that day's deposit of \$6,901.20, as shown on the account statement (Exhibit R-5). Charanpal Sandhu stated he had withdrawn other large sums of cash at different times in order to pay employees or his lease payment. With regard to the need to pay employees wages - in December when the fruit season was over - he explained that sometimes the orchard business did not have enough funds on hand to pay employees on a regular basis, notwithstanding the previous balance in the account was within the limit of the \$10,000 line of credit. He could not recall whether the appellant had the ability to withdraw funds from the Puneet Orchard account even though her pay cheques were deposited into it. He denied having collected EI benefits on behalf of Jasbal Sandhu who had been employed at Puneet Orchard for 3 or 4 years. He did not recall any details concerning a specific penalty - in the sum of \$5,912 - that had been levied against Puneet Orchard by an agency of the federal government concerned with administration of the EI system but stated he had received a number of other penalties that had been assessed without ever having been interviewed by any official. He agreed it was possible the appellant had filled out a benefits application form for Jasbal Sandhu but was unaware whether the appellant had completed the ROE for that worker. Charanpal Sandhu admitted it was possible he had cashed some of the cheques issued to Jasbal Sandhu - in order to accommodate him – but does not know the extent of his wife's participation in matters leading to the issuance of any specific monetary penalty because they separated in June, 2001.

[9] In response to questions from the Court, Charanpal Sandhu stated he thought the cheque – at tab 4 – in the sum of \$3,000 had been made out – originally - to Puneet Orchard but because the work was going to be done by Kiranpal Sandhu it was changed – probably by Malhi – and the cheque was deposited into the Puneet Orchard account. He stated the appellant was more qualified than other workers because she could drive a tractor. As a result, her wage was \$10 per hour

rather than the minimum wage or the approximate rate of \$9 per hour earned by cherry pickers on the basis of piecework.

[10] Brian Lundgren testified he has been employed for 20 years as an investigator for HRDC and had conducted investigations concerning the two periods of employment at issue in the within appeals. In the course of his inquiry, he undertook searches of accounts in financial institutions, obtained payroll information and spoke with several individuals, including the appellant and Malhi. Lundgren stated that, as a matter of practice, he examined daily time records in order to determine the start and finish time applicable to each worker on site. He examined the documents - at tabs 3 and 4 - including time records and cheques, pertaining to the appellant's employment with Malhi. Lundgren took note of the cheque - in the sum of \$3,000 - which had been issued by Malhi nearly 4 months before the commencement of any work by the appellant. He also noticed the original payee had been Puneet Orchard and that the cheque had been deposited into the business account of that entity. Lundgren also received a copy of the cheque - tab 5 - dated June 16, 1999 - issued by Malhi to Puneet Orchards - in the sum of \$1,200. To the best of his recollection, the notation "Pay Roll 98" was present on the left hand side of the cheque. Lundgren stated he took into account that this cheque had been issued more than 7 months after the appellant had been laid off. Lundgren spoke to Malhi on the morning of June 28, 2001 and, as a result of their conversation, later attended at the office of Susan Kassian, Malhi's bookkeeper. As Lundgren entered Kassian's office - just behind Malhi - at approximately 11:00 a.m. - he noted Malhi was presenting a sheet of paper to Kassian. A photocopy of that document is at tab 9. Lundgren stated he was somewhat surprised at this turn of events because Malhi - earlier that morning - had led him to believe that this record had already been provided to Kassian in the course of her performing normal accounting duties for Malhi's business. Having worked in the Osoyoos area for three years, Lundgren stated he had acquired some working knowledge on methods of operation used by orchard owners. The Puneet Orchard operation was about twice the size of the one owned by Malhi, and Lundgren stated he thought it odd that Malhi's smaller farm would be selling a substantial quantity of fruit to Charanpal Sandhu at the larger farm. He interviewed three or four Puneet Orchard workers - in relation to the 1998 farming season - and came to the conclusion that Charanpal Sandhu was absent for part of the season but the appellant resided on the property. Lundgren conducted interviews with workers pertaining to the 1998 season and - again - came to the conclusion that Charanpal Sandhu was absent for some portion of the growing season. Lundgren interviewed persons who had worked for the Grewal/Dhaliwal orchard and in respect of the 1999 season came to the conclusion there had been only one worker and it had not been the appellant. Lundgren described the Grewal/Dhaliwal property as comprising only 6 acres

including the area for the house and yard. In his opinion, it was more consistent with a farm operated on a part-time basis. Based on his experience in the Osoyoos area, Lundgren stated he would not expect someone to be picking peaches in September, October or November since that fruit is usually harvested by the middle of August. There are 7 or 8 kinds of apples – including a late variety – that may be picked in early October but not much later because – normally - by the end of September the apples trees are bare. Lundgren was referred to a document at tab 15, and identified it as a time sheet that had been prepared by Kassian. In Lundgren's opinion, that record is inadequate because it merely purported to show the number of hours worked by the appellant in one week. It did not specify the days or the hours per day. The cheque – at tab 14 – dated December 7, 1999 – in the sum of \$6,872.56 - was issued by Dhaliwal to the appellant. It was negotiated one week later and did not give rise to any concern even though it was issued 6 weeks - or more - after the termination of the employment because – in his experience – between 40 to 50 per cent of all employers in the orchard business pay their employees a lump sum at the end of the season, usually on the last day of work. However, the wages must be paid in full prior to the completion of the applicable ROE in which the earnings are reported.

[11] In cross-examination by counsel for the appellant, Brian Lundgren admitted he did not have any personal knowledge of the matters testified to concerning the purported absence of Charanpal Sandhu during the 1998 and/or 1999 growing seasons. Both ROEs – at tabs 1 and 12 – relating to the appellant's employment with Malhi and Grewal/Dhaliwal, respectively – had been issued by Kassian, the bookkeeper for the payor(s). Lundgren stated that about 60% of employers in the area maintain detailed daily records. With respect to the cheque – at tab 4 – where the payee had originally been Puneet Orchard - later crossed out and the name Kiranpal Sandhu added - Lundgren agreed the handwriting relating to the two names was not the same. He was aware that two or three cheques issued to the appellant had been deposited in the Puneet Orchard business account and accepted the proposition that a spouse could assist the other by turning over a personal pay cheque to assist in the operation of a business. Lundgren agreed he was not an expert on apples but – from his experience - still expected even the late variety to have been harvested by the early part of October.

[12] In re-examination by counsel for the respondent, Brian Lundgren stated that in the course of 20 years experience as an HRDC investigator, he had never encountered the situation – as in the within appeals relating to employment with Malhi – where an employee's cheque had been made payable to a business entity.

[13] Charanpal Sandhu testified – in rebuttal – that the harvest of the Fuji apple is very late – compared to other varieties – and the picking time in Oliver – being further north – is about one week later than Osoyoos so that the Fuji can be picked close to the end of October and even during the first week of November, depending on the season.

[14] In response to questions from the Court, Charanpal Sandhu stated he was familiar with the orchard operated by Grewal and Dhaliwal and had visited it many times. He knew they grew Fuji apples on the property and was well aware of the particular crops produced by each of his fellow farmers in the immediate area.

[15] Counsel for the appellant submitted there was no evidence to support the contention that the appellant had issued any documents with respect to workers at Puneet Orchard. With respect to her employment with Malhi, counsel submitted the evidence had demonstrated the Minister had relied on incorrect information in order to arrive at certain assumptions of fact as set forth in paragraph 3 of the Reply to the Notice of Appeal (Reply). Counsel submitted the evidence had demonstrated that the appellant was in insurable employment with Malhi during the relevant period. With respect to the appellant's employment with Grewal/Dhaliwal, counsel conceded the appellant had not been paid in cash by Dhaliwal, as alleged by her in a letter filed as Exhibit R-4. However, counsel submitted the evidence had shown the appellant had been engaged in insurable employment with Grewal and Dhaliwal during the relevant period.

[16] Counsel for the respondent submitted the evidence of the appellant should be rejected as it related to significant matters at issue because of the large number of inconsistencies and the lack of corroboration on material matters at issue. Concerning the period of employment – in 1998 – with Malhi, counsel submitted the comment contained in the document – Exhibit R-2 – that the appellant had requested Malhi make her cheque – in the sum of \$3,000 - payable to Puneet Orchard – as a matter of convenience – had not been supported by other evidence. The so-called time records – at tabs 3 and 4 – pertaining to her employment with Malhi have no entries between September 28 and October 12, inclusive. The cheque – at tab 5 – dated June 16, 1999 – in the sum of \$1,200 – should not have been included as insurable earnings in the ROE - as prepared by Kassian - because it had not been paid at that time and – therefore - was excluded from such calculation by the appropriate provision of the *Employment Insurance Regulations* issued pursuant to authority granted by the *Act*. The T4 slip issued by Malhi - in the sum of \$5,777.54 - did not seem to account for amounts of cash the appellant stated she received from time to time. As for her pay cheques being issued to Puneet Orchard - instead of herself - counsel submitted this

would not have been any more convenient than merely paying her in the normal course that one would associate with an ordinary employer-employee relationship. With respect to the employment with Grewal/Dhaliwal, counsel pointed out the ROE should not have been issued on November 5, 1999 - showing the last day worked as at November 6, 1999 – and certifying insurable earnings in the sum of \$7,280, because the appellant was not paid any wages until she received a cheque dated December 7, 1999. Taking all of the evidence into account, counsel submitted the decisions of the Minister pertaining to both periods of employment should be confirmed.

[17] Dealing first with the appeal concerning employment with Malhi during the period of July 6 to October 24, 1998, the Minister relied on the following assumptions as set forth in the relevant Reply:

- (a) during the Period, the Appellant resided in Osoyoos, B.C., where she and her spouse operated an orchard called Puneet Orchard;
- (b) Malhi operates an orchard in Oliver, B.C., which is about a 10 to 15-minute drive from Osoyoos;
- (c) Malhi issued a Record of Employment to the Appellant indicating that she had worked for him in the Period and that she had 742 insurable hours and insurable earnings of \$7,420.00;
- (d) in accordance with the T4 issued by Malhi in respect of the Appellant, the Appellant's net earnings for the Period should have been \$5,777.54;
- (e) Malhi provided the following cheques marked "Pay Roll" purporting to be in respect of the Appellant's wages for the Period:

<u>Date of cheque</u>	<u>Amount</u>
March 14, 1998	3,000.00
December 4, 1998	1,500.00
June 16, 1999	<u>1,200.00</u>
TOTAL	\$5,700.00

- (f) the cheque dated March 14, 1998 was made payable as follows: Puneet Orchard (Kiranpal Sandhu);
- (g) the cheque dated June 16, 1999 was made payable to Puneet Orchard;

- (h) during the Period, the Appellant's spouse was living in Winnipeg, Manitoba and selling fruit there;
- (i) during the Period, the Appellant was the manager of Puneet Orchard in Osoyoos;
- (j) during the Period, the Appellant had a 4-year-old son who could not be left alone;
- (k) Malhi's sister-in-law, who lived in Oliver, received a Record of Employment from Puneet Orchards indicating that she worked from July 20, 1998 to October 17, 1998 purportedly performing the same duties as the Appellant purportedly performed for Puneet;
- (l) the Appellant did not perform any services for Malhi in the Period; and
- (m) the Record of Employment issued to the Appellant by Malhi was issued solely to allow the Appellant to qualify for EI benefits to which she was not otherwise entitled.

[18] The assumptions which have been refuted by the appellant are 3(h), (i) and (k), in that the appellant and her husband both testified he was not living in Winnipeg during the 1998 season and had not been in that city since moving to Oliver in 1995. Charanpal Sandhu testified he was the manager of Puneet Orchard during 1998 and 1999 and had taken care of their young child during the day until his sister-in-law returned from school and was able to relieve him. He testified that Malhi did not have a sister-in-law and no such person had received a ROE from Puneet Orchard during the period alleged, or at all. The appellant testified she worked for Malhi and there is some documentary evidence - albeit riddled with inconsistencies - to support that contention.

[19] I wish to deal with some evidence as it related to administrative penalties apparently imposed by HRDC or CCRA relating to certain matters investigated in 2000 or 2001 pertaining to events occurring during those years and perhaps having a connection with the 1998 and 1999 growing seasons. Initially, I included – in these reasons - testimony concerning this matter on the basis it could have had a bearing on credibility of the appellant and her spouse - Charanpal Sandhu - who also testified as part of the case for the appellant. In order to be permitted to advance certain evidence later, counsel was required to put certain allegations to the appellant and her husband as they related to whether she had signed ROEs for Puneet Orchard or had acted otherwise in a management capacity concerning her alleged participation in obtaining EI benefits for Puneet Orchard workers. However, the evidence of Brian Lundgren

merely established that some sort of administrative penalty had been levied but he could not confirm it had been issued to the appellant in the sense she had been served with the appropriate documentation in that regard. As a result of the lack of specificity concerning this penalty - arising after the periods at issue in the within appeals - and the obvious capacity for this sort of evidence to be more prejudicial than probative, I chose - thereafter - to ignore evidence concerning the entire matter surrounding the EI benefits issued to Jasbal Sandhu in 2000 and/or 2001 because it does not assist me in the task of deciding the within appeals on the basis of relevant evidence. The purported conclusion concerning authorship of certain documents - perhaps issued during the relevant periods in the within appeals - was - again - totally based on hearsay. The Minister would have been well aware of the position of the appellant, namely, that she had worked during the relevant period(s) and was entitled to her EI benefits on the basis she had been employed in insurable employment in 1998 and 1999. If the Minister had wished to prove certain acts of the appellant in relation to her participation - at Puneet Orchard - in obtaining EI benefits for someone under inappropriate circumstances or unlawfully appropriating cheques issued to some worker - who may or may not have been entitled to receipt of same - then it would have been necessary to produce witnesses having direct knowledge of these matters. Information gathered by an investigator perusing some interdepartmental memoranda is not - without more - adequate to prove a particular theory relevant to the legitimacy of the employment which is the central issue of the within appeals. Certainly, the appellant must carry the burden of proof throughout but once an assumption of fact has been attacked - directly - then there is an evidentiary shift and the Minister cannot expect the Court merely to reject the evidence of witnesses with respect to a particular point in contention and to reinvigorate an assumption of fact - contained in the Reply - by reassigning the unassailable quality to which it was formerly entitled.

[20] The appellant's purported employment with Malhi was peculiar in some respects. First, it is strange that a husband - operating an orchard in his own right - would obtain an advance payment - in the sum of \$3,000 - from a prospective employer of his wife and then deposit that cheque into the orchard business account. The explanations offered by the appellant and her husband are not consistent and are unsatisfactory. The final cheque - in June, 1999 - in the sum of \$1,200 was also payable to Puneet Orchards. The so-called time records are inadequate. It is apparent she did not begin to work for Malhi - even though she had already obtained an advance of \$3,000 through the efforts of her husband - until July 6, 1998, two days after her EI benefits had expired. The evidence disclosed Malhi operated a substantial orchard and had other workers. The appellant was paid the sum of \$10 per hour because she is apparently more experienced. Since her husband departed in 2001, she

now operates Puneet Orchard on her own. It is not particularly significant that the appellant provided slightly different versions of details concerning a typical work week because the summer growing season required long days and it would be difficult to recall – precisely – a specific schedule several months later. The appellant admitted performing some work on Puneet Orchard property and that is logical because her spouse was the lessee and the operator of the business where their family residence was also located. There is no requirement that spouses employ each other – and often decline to do so with good reason - because that has often given rise to a denial of benefits because of the impact of marital status upon a working relationship. Once the appellant and her husband had rebutted the assumptions of fact – referred to above – there was no other evidence to support the contention of the Minister that the appellant had not performed any services for Malhi during the relevant period or that the ROE had been issued by Malhi – to the appellant – solely to allow her to qualify for EI benefits to which she was not otherwise entitled. Charanpal Sandhu denied the allegation that a worker employed by Puneet Orchard was a relative of Malhi. On December 10, 1999, nearly a year later, Charanpal Sandhu issued a Puneet Orchard cheque to Malhi – in the sum of \$6,037.52 – ostensibly in payment of purchases of fruit - as recorded in a sheet found at the tab 9 – together with an adding machine tape displaying certain entries and a total amount of \$6,038.52. This document was provided by Malhi to the bookkeeper – Kassian – in an extremely timely fashion since Malhi arrived in her office only steps ahead of Lundgren, the investigator for HRDC. Curiously, the account and the amount shown on the tape is \$1.00 greater than the cheque issued for payment. Earlier that morning, Malhi had assured Lundgren that this record of fruit purchases by Puneet Orchard had already been supplied to Kassian. This sheet identifies certain types of fruit and Charanpal Sandhu testified he would purchase certain varieties not grown on his own property in order to re-sell these small quantities – together with his own produce - to persons operating fruit stands.

[21] The appellant's employment with Grewal/Dhaliwal - appeal 2002-1552(EI) - concerns the period of August 3 to November 6, 1999. The appellant had been receiving EI benefits until August 3, 1999. The relevant property was only 6 acres and it appeared to Lundgren - from an examination of the payors' records - that only one other person had worked there. At the time the ROE was prepared by Susan Kassian – an unauthorized individual for that purpose – the appellant had not been paid her wages. Dhaliwal issued a cheque on December 7, 1999 – in the sum of \$6,872.56 – in payment of all wages earned by the appellant during the relevant period. That cheque was deposited in the Puneet Orchard account on December 15, 1999 (presumably as part of the deposit totalling \$6,901.20, as shown on Exhibit R-5) and the sum of \$5,600 was withdrawn the same day by Charanpal Sandhu, the

appellant's husband. The appellant was in India at that time and her husband had obtained the cheque and made the subsequent deposit. He could not recall the reason for withdrawing such amount except to speculate that it may have been to pay some late wages owed to employees because he often paid them in cash including amounts attributable to arrears. There were no other cash withdrawals greater than \$700 shown on the account extract – Exhibit R-5 – during the period of November 29 to December 31. The assumptions of fact relied upon by the Minister – as stated at paragraph 3 of the Reply – are:

- (a) during the Period, the Appellant resided in Osoyoos, B.C., where she and her spouse operated an orchard called Puneet Orchard;
- (b) the Partnership operates an orchard in Oliver, B.C., which is about a 10 to 15 minute drive from Osoyoos;
- (c) the Partnership issued a Record of Employment to the Appellant indicating that she had worked for them in the Period and that she had 728 insurable hours and insurable earnings of \$7,280.00;
- (d) the Partnership provided one cheque in the amount of \$6,872.56 marked "Farm Labour" purporting to be in respect of the Appellant's wages for the Period;
- (e) during the Period, the Appellant's spouse was living in Winnipeg, Manitoba and selling fruit there;
- (f) during the Period, the Appellant was the manager of Puneet Orchard in Osoyoos;
- (g) during the Period, the Appellant had a 5-year-old son who could not be left alone;
- (h) the Partnership's business consisted of 1 acre of cherries, 3 acres of peaches, 2 acres of apples and a few plum and apricot trees;
- (i) the partners lived on their orchard along with 3 of Jasvir Dhaliwal's sisters and his mother;
- (j) no record was kept of the actual days worked or the number of hours worked each day by the Appellant;
- (k) the last sale of fruit made by the Partnership was on September 18, 1999;
- (l) the Appellant did not perform any services for the Partnership in the Period; and

- (m) the Record of Employment issued to the Appellant by the Partnership was issued solely to allow the Appellant to qualify for EI benefits to which she was not otherwise entitled.

[22] The evidence of the appellant and her husband rebutted the assumption that he had lived in Winnipeg during the relevant period and was selling fruit there. The appellant testified concerning other workers who had been at the Grewal/Dhaliwal orchard and stated she did not recognize the names provided to her but recalled she had worked with Dhaliwal's sister for a few weeks. If the last sale of fruit was September 18, 1999, it is difficult to accept the appellant would be working until November 6, even considering the factor of the late-harvest Fuji apples because the small acreage had only 2 acres devoted to production of apples. No record was maintained of hours or days worked. The conclusion drawn by the Minister is that the appellant's purported employment with the Grewal/ Dhaliwal partnership was a sham designed solely to permit the appellant to obtain an ROE showing sufficient hours to permit her to qualify for EI benefits. Counsel for the respondent referred to the withdrawal of the sum of \$5,600 – the same day as the deposit of the cheque from Dhaliwal – as an unusual event for which no rational explanation was offered and submitted the Minister was entitled to conclude the money was being returned to Grewal/Dhaliwal because no services had ever been performed by the appellant and that the whole object of the exercise had been to obtain an ROE for the appellant who was visiting in India. The appellant had applied for EI benefits – tab 13 – on November 9, 1999 at a time when she had not yet been paid one cent by her purported employer. The ROE issued by Kassian was incorrect and misleading. At that date, the appellant had no insurable earnings from any alleged employment with Grewal/Dhaliwal. The ROE was issued one day before the appellant's last day of employment, another example of pre-emptive expediency on the part of Kassian, acting as agent for the payors.

[23] There have been many appeals under the *Act* pertaining to farm and orchard workers. Often, the records – if they exist at all – have been poorly maintained and are replete with mathematical errors, incorrect entries and various other inconsistencies. Payments to workers are often late. Cheques are either post-dated, back-dated or workers are – on occasion – paid a lump sum at the end of a season. As a result of a lack of proper documentation, it becomes a difficult process for all involved to determine several issues beginning with the primary question as to whether there was actual insurable employment during a relevant period. If that hurdle is overcome by an appellant, the next task is to demonstrate the number of insurable hours worked and the amount of the insurable earnings. The number of

insurable hours will determine eligibility for EI benefits, the amount of which will be determined by the insurable earnings. In order to be included as insurable earnings, a worker must have received payment for work done within the relevant period, unless there was an amount attributable to wage arrears and this default had been the subject of a complaint to a tribunal having jurisdiction to deal with employment standards. It is the duty of an appellant to prove – on a balance of probabilities – each of these ingredients. If a worker does not maintain a personal time record - in a form that can be produced later – and is unable to prove payments received in cash, either as to amount, time and place received, and other salient details, then it serves to create ongoing problems when the worker is later required to prove his or her case.

[24] In the case of *Narang v. Canada (Minister of National Revenue – M.N.R.)*, [1997] T.C.J. No. 99, the Honourable Judge Margeson, T.C.C., dealt with appeals concerning several workers who alleged they were employed for short periods of time by the employer to perform office, maintenance and field work on his berry farm. At paragraph 136 – and following – of his judgment, Judge Margeson commented:

[136] Some of the records upon which the Appellant and the Intervenor relied were prepared by the Appellant himself, allegedly by way of recopying of records purportedly prepared by other bookkeepers. This exercise, as viewed by any reasonable person, would have to be considered redundant at best, was without any reasonable explanation and without evidence from any other person who might have prepared the other records.

[137] The evidence of the income from cash sales in 1993 was only an estimate and was not based upon any acceptable or reasonable facts. The figures produced by the Appellant in this regard do not appear to be reasonable even if they were produced in the income tax return of the business for 1993 and they were inconsistent with a reasonable calculation of the Appellant's income in 1993 using the percentages that were supplied by the Appellant to the agent from Revenue Canada.

[138] The manner of payment of the wages was not normal. It is not a good idea to pay cash to employees and then obtain a receipt from them. In one case part of the wages were not even paid to the worker but allegedly to her husband.

[139] There were obviously no strawberries raised by this operation and yet one worker claimed to have picked one or the other or both. This is not something that a worker would forget easily.

[140] Apart from the fact that the wages were allegedly paid in cash, which is abnormal, the wages were purportedly paid in lump sums at the end of the work period, when the workers needed the money and in any event the periodic payment as set out in the ROEs was obviously incorrect.

[141] It is no answer to say that someone from Revenue Canada led the Appellant to believe that the ROE was unimportant in that regard. The ROE is important, it is the basis for the determination and what is alleged therein should be established.

[142] Surely if Kamaljit K. Gill had worked at the times she said that she did and was paid what she said that she was paid she would have had a better knowledge of who worked there at the same time and as to when she worked. The information given to the interviewer would have been consistent with her evidence in Court. There would have been substantially more evidence of supervision, she would have had some further proof of her receipt of wages, there would have been some independent corroboration of the fact that she had worked such as the evidence of other workers. The very nature of the work that she was said to have performed was suspect under the circumstances given her very limited knowledge of anything else that was alleged to have gone on there.

[143] If Raj R. Narang had been engaged in insurable employment as alleged here she would have known exactly what she did, what kind of berries she picked, she would have received her wages regularly and she would have been more knowledgeable about the names of fellow workers. The Court is extremely doubtful that she would have been employed during the last one and a half months picking up garbage and performing the other chores that she was said to have performed. She would have received all of her wages and they would not have been paid to her husband. There would be no doubt in her mind when those wages were received.

[25] In the case of *Khunghun v. Canada (Minister of National Revenue – M.N.R.)*, [2002] T.C.J. No. 483, The Honourable Judge Miller, Tax Court of Canada, encountered similar difficulties. The appeal involved whether the appellant had worked in insurable employment - in an orchard – during the summer of 2000, and, if so, what was the correct number of insurable hours. In the *Khunghun* matter, the Agricultural Compliance Team had visited the orchard on a day when the appellant was not present. Also, the appellant had not maintained a record of her hours and her husband – whom it had been suggested had kept track of her hours – was not produced as a witness. Cheques had been made out – by the payor – to the worker on a more or less regular basis but the appellant had actually received payment all at

once at the end of the growing season in October. As in the within appeals, it was necessary to examine conflicting documents, assess credibility of witnesses and sort through a variety of documents, mainly of which were in apparent conflict in order to determine whether a true employer/employee relationship had existed and then to undertake the appropriate calculations in order to fix the amount of insurable hours and earnings.

[26] First, I will deal with the appellant's claim concerning her employment with Malhi during the period of July 6 to October 24, 1998. While there are many oddities about this working relationship - including the payment of the \$3,000 advance by cheque originally payable to Puneet Orchard and deposited into the business account - I accept the appellant was employed in insurable employment with Malhi during this period. The Malhi operation was reasonably large and there was evidence provided by the appellant in relation to her duties, work schedule and other related pieces of information that were sufficiently credible to sustain her position that she had been employed in insurable employment. However, the sum of \$1,200 received by cheque - dated June 16, 1999 - in payment of wages earned by the appellant during the 1998 season cannot be included in the calculation of insurable earnings.

[27] I turn now to a consideration of the issue of the appellant's employment - in 1999 - with Grewal/Dhaliwal. In this matter, one must bear in mind the orchard was very small and the last sale of fruit occurred on September 18, 1999. There was some reference to a record of days and/or hours allegedly worked by the appellant but none was produced in evidence. The payment for wages was made by one cheque - dated December 7, 1999 - deposited to the Puneet Orchard account, followed by an immediate withdrawal of cash by Charanpal Sandhu - husband of the appellant - while the appellant was visiting in India. There was no adequate explanation provided for this transaction. It is not probable that the appellant worked on the small property of Grewal/Dhaliwal until November 6, 1999. The appellant responded to a question in the Questionnaire - tab 20 - concerning a detailed explanation of duties performed and she responded, "picked and packed fruit" and "general cleanup". The ROE - issued on November 5, 1999 by Susan Kassian - bookkeeper for the payors - certified that the appellant had been paid the sum of \$7,280 when she had - at that point - received nothing. Then, there was the curious assertion by the appellant as contained in her letter of November 15, 2001 - directed to the Chief of Appeals at CCRA handling her matter - that she was paid cash for her work. The evidence disclosed she had a working knowledge of the business of Puneet Orchard and access to its books, records and statements of account at the Credit Union and she ought to have known that payment for her wages had been the subject of a cheque issued by

Dhaliwal, unless the entire arrangement for her alleged employment had been the subject of a bargain made between her husband and Dhaliwal and/or Grewal.

[28] The process of establishing insurable employment and – with it – the subsequent entitlement to EI benefits is not an exercise in hide-and-seek. It is also not intended to replace the popular party game – charades - where one player has to divine the meaning of some phrase, and/or identify a word, person or object by relying on obscure and – usually – obtuse clues poorly communicated. The Minister - prior to issuing the decision which later becomes the subject of an appeal – is not required to conduct an extensive forensic accounting examination or analyze every possible aspect of a working relationship in order to formulate a plausible theory that may account for glaring inconsistencies inherent in the material and statements submitted – at various times - by the worker. During the course of hearing an appeal, the Court is not required to accept a bald assertion from an appellant that there was a genuine employer-employee relationship and - in the absence of credible evidence - to undertake revision of a misleading ROE or to repair various defects in documentation pertaining to the working relationship. The Court must consider whether there is sufficient credible evidence to demonstrate the existence of insurable employment. Each case is different and, in those involving several persons working for the same payor, it is often necessary to examine the evidence as it specifically relates to each person rather than relying on a blanket approach. In the same vein, appeals dealing with several periods of employment - particularly involving different payors - can produce varied results.

[29] Taking into account all of the evidence, I am not satisfied the appellant was engaged in insurable employment with the payors Grewal/Dhaliwal during the period of August 3 to November 6, 1999. As a result, appeal 2002-1552(EI) is hereby dismissed.

[30] Appeal 2002-1550(EI) – pertaining to the appellant's employment with Malhi – in 1998 – is hereby allowed and the decision of the Minister is varied to find:

the appellant was engaged in insurable employment with Param R. S. Malhi during the period of July 6 to October 24, 1998; her insurable hours were 742 with insurable earnings in the sum of \$6,220.

Signed at Sidney, British Columbia, this 27th day of February 2003.

"D.W. Rowe"

D.J.T.C.C.

CITATION: 2003TCC75

COURT FILE NO.: 2002-1550(EI), 2002-1552(EI)

STYLE OF CAUSE: Kiranpal K. Sandhu and M.N.R.

PLACE OF HEARING Vancouver, British Columbia

DATE OF HEARING December 5, 2002

REASONS FOR JUDGMENT BY: the Honourable Deputy Judge
D.W. Rowe

DATE OF JUDGMENT February 27, 2003

APPEARANCES:

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