

Docket: 2012-3086(EI)

BETWEEN:

KALBIR S. PUNI,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

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Appeal heard on May 14, 2013, at Kamloops, British Columbia.

Before: The Honourable Justice David E. Graham

Appearances:

For the Appellant:                   The Appellant Himself  
Counsel for the Respondent:       Jack Warren

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**JUDGMENT**

The appeal from the decision of the Minister of National Revenue made under the *Employment Insurance Act* for the period from June 6 to November 20, 2011 is allowed on the basis that the Appellant was employed in insurable employment during this period.

Signed at Ottawa, Canada, this 29<sup>th</sup> day of May 2013.

“David E. Graham”

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Graham J.

Citation: 2013 TCC 172

Date: 20130529

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BETWEEN:

KALBIR S. PUNI,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

### **REASONS FOR JUDGMENT**

Graham J.

[1] Kalbir Puni is the owner of one-third of the shares of 0834216 B.C. Ltd. (the “Company”). The Company employed Mr. Puni from June 6 to November 20, 2011. After he was laid off by the Company, Mr. Puni made a claim for employment insurance benefits. As a result of that claim, the Minister of National Revenue issued a ruling stating that Mr. Puni was not engaged in insurable employment with the Company during the period in question because, in the Minister’s view, Mr. Puni did not deal at arm’s length with the Company. Mr. Puni has appealed that ruling.

[2] Mr. Puni was the only witness at trial. I found him to be a credible witness.

#### **Facts:**

[3] In 2008, Mr. Puni and two unrelated individuals named Jesmail Singh Mann and Manjinder Singh Nahal decided to open a Nando’s Flame-Grilled Chicken franchise in Kamloops, British Columbia. The 3 men incorporated the Company and each of them took one-third of the shares.

[4] As part of the process of obtaining a Nando’s franchise, at least one of the shareholders was required to take franchisee training. Among other things, the training taught franchisees how to work as front staff, back staff, kitchen staff and managers. Mr. Mann and Mr. Puni both began the training but, due to ill health, Mr.

Mann was unable to complete it. Therefore, Mr. Puni was the only shareholder who completed the required training.

[5] The restaurant opened in the Spring of 2009.

[6] Mr. Puni was hired by the Company to manage the restaurant. The shareholders agreed to let Mr. Puni make all of the day-to-day business decisions for the Company since, as the manager, he was in the best position to do so. All other decisions were made by the shareholders on a majority-rule basis.

[7] Mr. Nahal was involved with another Nando's franchise in Abbotsford, British Columbia. As a result, Mr. Puni sometimes relied on Mr. Nahal's advice and expertise when dealing with issues that arose in the business.

[8] The restaurant did well through the Spring and Summer of 2009 but business began to slow down in the Fall.

[9] In 2010, the Company began to have cashflow issues. On a number of different occasions, the Company asked certain employees to hold off cashing their paycheques until the Company had enough money in the bank to cover those cheques. As the manager, Mr. Puni was the person responsible for making this request to employees. Mr. Puni explained that he used a method to select which employees would be asked not to cash their paycheques. He explained that because he was a shareholder, he was always the first employee to be asked by the Company to delay cashing his paycheque. If that was not enough to solve the cashflow problem, the Company would then ask Mr. Mann's son, Kubby Mann, to delay cashing his paycheque. If there was still a cashflow problem, the Company would ask certain other employees to delay cashing their paycheques. Mr. Puni explained that those employees were selected based on his understanding of their need for immediate cash. In other words, if he felt a given employee could afford not to be paid immediately, he would ask that employee to delay cashing his or her paycheque instead of asking an employee who appeared to need the money immediately. There were 3 employees in addition to Mr. Puni and Kubby Mann who were asked to delay cashing their paycheques at various times from 2010 to 2011. Sometimes they refused to do so and other times they agreed.

[10] All of the employees who were asked to delay cashing their paycheques (including Mr. Puni and Kubby Mann) were ultimately paid in full.

[11] In 2010, due to the Company's cashflow problems, the shareholders had to lend money to the Company. Mr. Mann and Mr. Nahal lent their share of money to the Company using their own funds. Mr. Puni did not have funds available to lend to the Company. As a result, he advanced his share of the loans by having some of the pay that he would otherwise have received as an employee credited to his shareholder loan account. Mr. Puni did not provide any accounting records showing his salary being added to his shareholder loan. He explained that he was unable to do so because, due to disputes among the shareholders, he did not have access to the detailed accounting records. I accept Mr. Puni's testimony on this matter despite the lack of documentary support.

[12] At some point in 2010, an issue outside of the business caused Mr. Mann and Mr. Nahal to refuse to speak to each other. As a result, from that point forward, Mr. Puni acted as a go between for the two men. The two most contentious issues that the shareholders had to deal with in 2010 and beyond were which employees and suppliers to delay paying and when to do so.

[13] Eventually, Mr. Puni began to feel the financial pinch both of having to lend money to the Company and of having to delay cashing his paycheques. He advised the Company that he could not continue to agree to delay cashing his paycheques. As a result, he was laid off.

[14] During the period following Mr. Puni's layoff, the Company operated without a fully trained manager. It appears that this lack of oversight by a manager led to an increase in food costs and slippage.

[15] In June 2011, the Company decided to re-hire Mr. Puni as its manager in order to attempt to control its costs and slippage. Mr. Puni worked for the Company from June 6, 2011 until he was again laid off on November 20, 2011.

[16] From June 6 to November 20, 2011, Mr. Puni earned approximately \$18,000. Approximately \$8,000 of that amount was credited to his shareholder loan. The remaining \$10,000 was paid to him but, as had occurred in 2010, he was once again asked to delay cashing his paycheques when there were cashflow problems. Mr. Puni was ultimately paid the approximately \$10,000 in full.

[17] Mr. Puni reported the full \$18,000 as employment income when he filed his 2011 tax return.

**Legislation and Applicable Test:**

[18] Subsection 5(1) of the *Employment Insurance Act* defines “insurable employment”. Paragraph 5(2)(i) states that insurable employment does not include “employment if the employer and employee are not dealing with each other at arm’s length”.

[19] Subsection 5(3) expands on arm’s length dealings. It states:

- (3) **Arm’s length dealing** – For the purposes of paragraph (2)(i),
- (a) the question of whether persons are not dealing with each other at arm’s length shall be determined in accordance with the *Income Tax Act*; and
  - (b) if the employer is, within the meaning of that Act, related to the employee, they are deemed to deal with each other at arm’s length if the Minister of National Revenue is satisfied that, having regard to all the circumstances of the employment, including the remuneration paid, the terms and conditions, the duration and the nature and importance of the work performed, it is reasonable to conclude that they would have entered into a substantially similar contract of employment if they had been dealing with each other at arm’s length.

[emphasis added]

[20] The test to be applied by the Court when considering a decision of the Minister under paragraph 5(3)(b) was summarized by Marceau J.A. at paragraph 4 of the Federal Court of Appeal decision in *Légaré v. Minister of National Revenue*, 1999 CarswellNat 1458:

The Act requires the Minister to make a determination based on his own conviction drawn from a review of the file. The wording used introduces a form of subjective element, and while this has been called a discretionary power of the Minister, this characterization should not obscure the fact that the exercise of this power must clearly be completely and exclusively based on an objective appreciation of known or inferred facts. And the Minister's determination is subject to review. In fact, the Act confers the power of review on the Tax Court of Canada on the basis of what is discovered in an inquiry carried out in the presence of all interested parties. The Court is not mandated to make the same kind of determination as the Minister and thus cannot purely and simply substitute its assessment for that of the Minister: that falls under the Minister's so-called discretionary power. However, the Court must verify whether the facts inferred or relied on by the Minister are real and were correctly assessed having regard to the

context in which they occurred, and after doing so, it must decide whether the conclusion with which the Minister was “satisfied” still seems reasonable.

[21] *Légaré* dealt with paragraph 3(2)(c)(ii) of the *Unemployment Insurance Act*. That provision later became paragraph 5(3)(b) of the *Employment Insurance Act*. I cannot discern any material difference between the two provisions<sup>1</sup>.

[22] For paragraph 5(3)(b) to apply, the employer must be “related” to the employee within the meaning of the *Income Tax Act*. The relevant provision of the *Income Tax Act* is paragraph 251(2)(b). The relevant portion of that paragraph states that a related person is:

- (b) a corporation and
  - (i) a person who controls the corporation, if it is controlled by one person,
  - (ii) a person who is a member of a related group that controls the corporation, or
  - (iii) any person related to a person described in subparagraph(i) or (ii);

[23] Mr. Puni does not control the Company nor is he a member of a related group that controls the Company as he is not related to Mr. Mann or Mr. Nahal by blood, marriage, common law partnership or adoption. Therefore, Mr. Puni is not “related to the Company” within the meaning of the *Income Tax Act*.

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<sup>1</sup> Paragraph 3(2)(c) previously read:

Excepted employment is

(c) ... employment where the employer and employee are not dealing with each other at arm's length and, for the purposes of this paragraph,

(i) the question of whether persons are not dealing with each other at arm's length shall be determined in accordance with the provisions of the *Income Tax Act*, and

(ii) where the employer is, within the meaning of that Act, related to the employee, they shall be deemed to deal with each other at arm's length if the Minister of National Revenue is satisfied that, having regard to all the circumstances of the employment, including the remuneration paid, the terms and conditions, the duration and the nature and importance of the work performed, it is reasonable to conclude that they would have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length; ...

[24] Since Mr. Puni is not related to the Company, paragraph 5(3)(b) does not apply to him. Thus, the issue of whether Mr. Puni dealt at arm's length with the Company or not must be determined under paragraph 5(3)(a).

[25] The Respondent submits that the Court is required to give the same judicial deference to a conclusion reached by the Minister under paragraph 5(3)(a) that the Court gives to a similar conclusion reached by the Minister under paragraph 5(3)(b). I disagree.

[26] Although the case was not discussed during argument, the Respondent's Book of Authorities contained a copy of the Federal Court of Appeal decision in *Vardy Villa Limited v. The Minister of National Revenue*, 2002 FCA 287, ("*Vardy Villa*"). Like *Légaré*, *Vardy Villa* dealt with paragraph 3(2)(c). The following paragraphs from *Vardy Villa* support my view:

[5] Subparagraph 3(2)(c)(ii) cases involve a two-step procedure, one involving a decision that the employer and employee are related and, second, a discretionary decision by the Minister about whether, despite this relationship, the contract of employment is nonetheless substantially similar to one that would be made if they were at arm's length.

[6] As for cases under subparagraph 3(2)(c)(i) of the Act, there is no two-step procedure. If an unrelated employer and employee are not dealing with each other at arm's length, in accordance with the provisions of the Income Tax Act, the employment in issue is "excepted". There is no need for the Minister to exercise this discretion and express his satisfaction about the factual matters set out in subparagraph 3(2)(c)(ii), unless the parties are found to be related. This is clear because, while the Minister is mentioned in subparagraph 3(2)(c)(ii), there is no mention of the Minister or his obligation to decide anything in subparagraph 3(2)(c)(i).

[7] Any decision made pursuant to subparagraph 3(2)(c)(i) is subject to *de novo* review by the Tax Court ...

### **Respondent's Position:**

[27] Counsel for the Respondent conceded that the only aspect of Mr. Puni's relationship with the Company that caused the Minister to conclude that his employment was non-arm's length was the fact that some of his pay was credited to his shareholder loan and some of his pay was deferred. All other aspects of Mr. Puni's employment indicated an arm's length relationship.

[28] Counsel for the Respondent was clear that there was no evidence that Mr. Puni was attempting to use his purported non-arm's length relationship with the Company in order to abuse the employment insurance system but submitted that, as the relationship was nonetheless non-arm's length, Mr. Puni was not engaged in insurable employment.

[29] The Respondent submits that the fact that some of Mr. Puni's pay was credited to his shareholder loan was strong evidence of the non-arm's length nature of Mr. Puni's relationship with the Company. The Respondent says an arm's length employee would never have been asked to make such a loan and that Mr. Puni was not given any choice in the matter.

[30] I disagree with the Respondent's characterization of these loans. Mr. Puni wore two hats: that of an employee of the Company and that of a shareholder of the Company. He was compelled to contribute funds to the Company but that compulsion came from his role as a shareholder, not his role as an employee. If Mr. Puni had had access to funds the same way that Mr. Mann and Mr. Nahal did, then he could have simply lent those funds to the Company and there would have been no impact on his salary. The compulsion to lend the funds would still have existed but the lending would have occurred in a different manner. The fact that Mr. Puni was compelled to lend his salary to the Company arises from the fact that his salary was his only source of funds, not from his employment relationship. Despite the fact that the money never actually went into Mr. Puni's hands but rather was simply credited to his shareholder loan, I find that he received the employment income in his role as an employee of the Company and then lent that money to the Company in his role as a shareholder. Thus, I find that these loans have no impact on whether Mr. Puni dealt at arm's length with the Company or not.

[31] Thus, the only factor that remains out of the totality of Mr. Puni's relationship with the Company that could be said to show a non-arm's length relationship is the fact that Mr. Puni was asked to defer cashing his paycheques from time to time. While this is clearly an unusual term of employment, the evidence indicated that Mr. Puni was not the only employee to whom the term applied. There were 4 other employees who were asked to defer cashing their paycheques, 3 of whom had no connection to the shareholders. The Respondent submitted that the difference between those employees and Mr. Puni was that they had a choice whether to defer their pay or not whereas Mr. Puni was required to do so. I disagree. The evidence was clear that the reason Mr. Puni was laid off in 2010 was that he refused to continue having his pay deferred. While it was clear that Mr. Puni was always the first employee asked to defer receiving his paycheque, I do not find this fact alone to



be sufficient to find Mr. Puni and the Company not to have been dealing with each other at arm's length when all of the other evidence indicates that they were.

[32] The Respondent also submitted that Mr. Puni was the most influential of the 3 shareholders because he was the one involved in the day-to-day business. I accept that his involvement in the day-to-day business would have given Mr. Puni particular knowledge of the business and that the fact that he was the only shareholder who had been trained by Nando's would also give him a certain level of power. I also accept that Mr. Puni's role as a go-between due to the breakdown in the relationship between Mr. Mann and Mr. Nahal would have given him additional power. However, there is no evidence that Mr. Puni used such power in establishing his employment relationship with the Company. In fact, the evidence indicates that, other than the payment issues referred to above, Mr. Puni's employment relationship with the Company did not change from 2009 (when Mr. Mann and Mr. Nahal were getting along) to 2011 (when they were no longer speaking). The evidence does not suggest that Mr. Mann and Mr. Nahal were naïve shareholders under the control of Mr. Puni. Mr. Mann had access to information about the day-to-day operations through the presence of his son Kubby and Mr. Nahal had expertise about the operation of a Nando's franchise through his involvement with his franchise in Abbotsford. Furthermore, any additional power that Mr. Puni had over the other shareholders was balanced by the lack of power that he had due to his weaker personal financial position and his dependence on the Company for his income. I am therefore not prepared to accept that Mr. Puni had any level of *de facto* control over the Company.

**Conclusion:**

[33] Based on all of the foregoing, I find that Mr. Puni was engaged in insurable employment from June 6 to November 20, 2011. The Appeal is therefore allowed.

Signed at Ottawa, Canada, this 29<sup>th</sup> day of May 2013.

“David E. Graham”

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Graham J.

CITATION: 2013 TCC 172

COURT FILE NO.: 2012-3086(EI)

STYLE OF CAUSE: KALBIR S. PUNI AND THE MINISTER  
OF NATIONAL REVENUE

PLACE OF HEARING: Kamloops, British Columbia

DATE OF HEARING: May 14, 2013

REASONS FOR JUDGMENT BY: The Honourable Justice David E. Graham

DATE OF JUDGMENT: May 29, 2013

APPEARANCES:

For the Appellant: The Appellant Himself  
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