Docket: 2007-3353(EI)

BETWEEN:

PARKASH KAUR CHAHAL,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on May 8 and 9, 2008, at Vancouver, British Columbia.

Before: The Honourable Justice Patrick Boyle

Appearances:

Agent for the Appellant:	Gurpreet Pabla
Counsel for the Respondent:	B.J. Wray (Student-at-Law) Sara Fairbridge

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JUDGMENT

The appeal is allowed and the Minister's decision is varied in accordance with the Reasons herein.

Signed at Ottawa, Canada, this 12th day of June 2008.

"Patrick Boyle"

Boyle, J.

Citation: 2008TCC347
Date: 20080612
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PARKASH KAUR CHAHAL,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Boyle, J.

[1] Mrs. Chahal immigrated to Canada from India in 2000 when she was in her late sixties. She does not speak English. She can neither read nor write in any language; nor is she numerate. She was a farmworker in India. She is a seasonal berry picker in British Columbia.

[2] For the years in question, 2005 and 2006, she has been denied Employment Insurance benefits. The issue is whether, and the extent to which, Mrs. Chahal was helped in her work by her husband and her son or others. Mrs. Chahal testified at the hearing that she was not helped by her husband or by anyone else although there is evidence of earlier statements of hers to the effect that she had been helped at times by her husband and on one occasion by her son.

[3] Mrs. Chahal's 2005 Report of Earnings as originally filed showed insurable earnings paid to her of $8,190 and insurable hours of 840. It had been prepared and filed by ADP, her employer's outsourced payroll service provider. There is no dispute regarding whether she received $8,190, although the Crown questions whether it was all paid to her for her own work. There is also no dispute that her 2005 hourly rate of pay was $8.75, although the Crown suggests there may have been some relationship between the number of hours for which she was paid and the

number of pounds of berries she picked. Mrs. Chahal's ADP payslips clearly show her hourly rate is $8.75. Nonetheless, it is apparent and obvious that ADP prepared the ROE using a $9.75 hourly rate instead of the $8.75 rate. When a revised ROE was filed showing insurable earnings unchanged at $8,190 and reflecting 936 insurable hours, being the correct number of hours calculated at an $8.75 rate of pay, the ROE, and presumably Mrs. Chahal's EI application, was referred to the Integrity Division of Human Resources and Skills Development Canada. One of the reasons for this is that the revision to the ROE was material because Mrs. Chahal needed 910 hours of insurable employment to qualify for EI benefits in 2005.

[4] An HRSDC EI Integrity Division officer testified regarding her review of the revised ROE and Mrs. Chahal's EI application. After several discussions with Mrs. Chahal, her employer and the driver who picked her up each morning and dropped her off each evening, the EI officer was concerned because she had received somewhat inconsistent answers. In particular, there were different answers regarding whether, and the extent to which, Mrs. Chahal may have been helped in her work by her husband or her son. The EI officer's conclusion was that the revised ROE was suspicious because of Mrs. Chahal's statement that her husband had helped her. She referred Mrs. Chahal's file on to Canada Revenue Agency's CPP/EI Rulings for a ruling on her insurable employment, insurable earnings and insurable hours. The EI officer's conclusion in this regard certainly appears to be reasonable based upon the information available to her and about which she testified.

[5] However, I pause to state that I do not accept as evidence worthy of any weight in this proceeding the EI officer's summary of what she was told by persons who did not testify at the two-day trial of this matter. Importantly, this includes her hearsay evidence and notes of her discussions with the employer and the employer's driver. I will have more to say later about the failure of either side to call any of these people or explain their absence, and I will also separately address below essentially similar evidence and notes from the CRA Rulings Officer and the CRA Appeals Officer to which I do extend some weight. I found that the EI Integrity officer was defensive and combative in her testimony and that she was condescending in her argumentative attitude to Mrs. Chahal's counsel, Mr. Pabla. Since she appeared clearly to want to defend her decision throughout her testimony, as though her decision was on trial or being reviewed, I am concerned that this may also have been reflected in her notes as well. I am not suggesting this witness said anything untruthful, I am merely sufficiently concerned about its completeness to not be comfortable relying on her notes or recollection of what others not present said to her. I raised these concerns with this witness and Crown counsel in the course of her testimony. Further, no notes of any conversations or interviews or meetings with

anyone other than Mrs. Chahal were put in evidence by this or any other Crown witness although I understand such notes were taken.

[6] The CRA EI/CPP Rulings Officer explained why she adjusted Mrs. Chahal's insurable earnings to $4,900 from $8,190 for 2005, from $8,070 to $4,707 for 2006, and her insurable hours from 936 to 560 (not 840) for 2005 and from 900 to 525 for 2006.

[7] The Rulings Officer said she had been asked to determine Mrs. Chahal's actual hours and earnings because it had been "suggested that she had assistance from her husband and her son to increase the hours". On the important issue of the extent to which Mrs. Chahal was helped by her husband Gurpal Chahal or her son Balbir Chahal, the Rulings Officer said that, in addition to reviewing the EI officer's file, she was told in a conversation with Mrs. Chahal that her husband had helped pick but did not pick with her all the time. Mrs. Chahal also said that her son had helped her picked on only one occasion at the end of the day on one of the few days he came to pick her up. The Rulings Officer also said she spoke with the driver who said that sometimes he picked up both Mrs. Chahal and her husband.

[8] The Appeals Officer's notes made record of a telephone conversation she conducted in Punjabi with Mrs. Chahal. These reflect that Mrs. Chahal twice said that sometimes, four to five times only, her husband worked in 2005 and not at all in 2006. She also was told Gurpal did not work much and did not pick all day but sat down. Mrs. Chahal also said his berries were not counted with hers, and that her ROE only showed her earnings and hours in 2005 and 2006.

[9] When the Rulings Officer reviewed with Mrs. Chahal her answers from a meeting with the EI Integrity officer, the Rulings Officer's own notes confirmed Mrs. Chahal said no one helped picked her berries in 2006 and that her husband helped her maybe four or five times in 2005. Mrs. Chahal also told her that her son helped her for about one hour once when he came to pick her up at the end of the day.

[10] While the CRA Rulings Officer's notes say she ended the conversation by saying she needed to speak with the employer, there were no notes of any such conversation or meeting by her with the employer or with anyone else. The Rulings Officer said she was not able to speak to the employer at the time because he was attending his sister's funeral in India. There was no evidence he was ever spoken to upon his return.

[11] The Rulings Officer did testify she had read file notes the EI Integrity officer had made of a conversation held with the employer. These notes were not put in evidence by either of these Crown witnesses though it was suggested to them by the Appellant's counsel and the Court this may prove helpful. In the circumstances, and given my comments about the EI officer's testimony and notes above, I cannot accord any weight to this double hearsay relied on by the Rulings Officer. For the record, however, I should add that it does not even suggest that Mrs. Chahal did not work each day recorded or that she in fact had significant help from her husband.

[12] The Rulings Officer testified she had spoken with the employer's driver, who picked up Mrs. Chahal each morning and dropped her off each evening, who told her "sometimes" he would pick both of them up. No notes of this discussion were put in evidence. The driver was not called to testify.

[13] The Rulings Officer based her ruling as follows. She was satisfied Mrs. Chahal worked for her employer. She could not apply Regulation 9.1 of the *EI* legislation because there was no "actual proof" of the hours that Mrs. Chahal worked because "we figured she did not pick the full amount of berries" and "she had help picking the berries". Implicitly, the officer did not find the ROE, payslips, the employer's daily hour logs for all employees, the employer's seasonal day log for Mrs. Chahal, or the ADP payroll summary sufficient proof. She therefore used Regulation 10 where, according to the officer, the maximum hours permitted are 35 hours per week. She was satisfied Mrs. Chahal worked hard for her employer and worked full time so she applied the $8.75 rate for 2005 (and a $9 rate for 2006) to the sixteen week 2005 season Mrs. Chahal worked. This was a simple arithmetic exercise for CRA. This was not tested against the hours Mrs. Chahal was picked up and dropped off daily, nor tested as to whether it was reasonable to think her husband and her son worked to the extent reflected by the large downward adjustments which resulted.

[14] In the Appeals Officer's words, "So, instead of having to believe what the records show, that she worked ten hours a day, we went over to the other side of Regulation 10 saying, 'We'll give her a maximum of 35 hours per week.' "

[15] There was no evidence of Mrs. Chahal ever doing anything else but work while she was at her employer's. There was evidence put in by both parties that her husband was ailing, could hardly walk and could not see very well, having had eye surgery in 2005. The Crown's assumptions included that Mrs. Chahal was paid by the hour at the rate mentioned. While the Crown suggested that maybe the pickers, including Mrs. Chahal, were paid based on weight not by the hour, because their daily pickings were weighed, and perhaps weight was somehow converted into hours, there was no denial she was paid by the hour, no credible or persuasive

evidence she was not but was paid by the weight of berries picked, no evidence of any conversion rate for pounds of berries to hours of work, indeed no evidence from the Crown of how many pounds a picker might pick in a given time, etc.

[16] The Rulings Officer acknowledged in cross-examination that CRA's concern about berry pickers' pickings being converted to hours by employers exists with the industry as a whole and an employer's conversion is accepted unless it appears from the information in the file to be wrong. In this case, the file indicated some of the berries may not have been picked by Mrs. Chahal, hence these proceedings.

[17] Mrs. Chahal appealed the ruling. The Crown also called the CRA Appeals Officer. The CRA Appeals Officer's notes were also put in evidence. Her notes of this call are an adequate seven lines long. Those notes evidence Mrs. Chahal also told the Appeals Officer that "husband helped once and [*sic*] a while" in 2005 and 2006. There is no mention of the son ever helping.

[18] The CRA Appeals Officer has a page of notes of her conversation with the employer. He told her that Mr. Chahal had helped out Mrs. Chahal in 2005 and 2006 and that he was very old and could barely walk. There is no mention of the frequency of the husband's help. There is no mention of the son whatsoever.

[19] The CRA Appeals Officer confirmed the ruling because she concluded Mrs. Chahal had help from her husband and her son. She obviously agreed the CRA Rulings Officer had properly applied Regulation 10 and allowed 35 hours per week. She did not appear to test the insurable hours or earnings in the ruling against the totality of the evidence. She did not make any conclusion regarding the extent of earnings or hours of the husband's contribution even though the result of the ruling's arithmetical application of a 35-hour week to someone who went to work from 7 a.m. to 7 p.m. six and, sometimes, seven days a week had the effect of almost halving her earnings and her hours.

I. Law

[20] The relevant provisions of the *Employment Insurance Act* and *Regulations* are as follows:

Employment Insurance Act

Hours of insurable employment

55(1) The Commission may, with the approval of the Governor in Council, make regulations for establishing how many hours of insurable employment a person has, including regulations providing that persons whose earnings are not paid on an hourly basis are deemed to have hours of insurable employment as established in accordance with the regulations.

Alternative methods

(2) If the Commission considers that it is not possible to apply the provisions of the regulations, it may authorize an alternative method of establishing how many hours of insurable employment a person has.

Alteration or rescission of authorization

(3) The Commission may at any time alter the authorized method or rescind the authorization, subject to any conditions that it considers appropriate.

Agreement to provide alternative methods

(4) The Commission may enter into agreements with employers or employees to provide for alternative methods of establishing how many hours of insurable employment persons have and the Commission may at any time rescind the agreements.

Insurable Earnings and Collection of Premiums Regulations

PART I — INSURABLE EARNINGS

Earnings from Insurable Employment

2.(1) For the purposes of the definition "insurable earnings" in subsection 2(1) of the Act and for the purposes of these Regulations, the total amount of earnings that an insured person has from insurable employment is

(*a*) the total of all amounts, whether wholly or partly pecuniary, received or enjoyed by the insured person that are paid to the person by the person’s employer in respect of that employment, and

(*b*) the amount of any gratuities that the insured person is required to declare to the person’s employer under provincial legislation.

Employment Insurance Regulations

PART I — UNEMPLOYMENT BENEFITS

Hours of Insurable Employment — Methods of Determination

9.1 Where a person's earnings are paid on an hourly basis, the person is considered to have worked in insurable employment for the number of hours that the person actually worked and for which the person was remunerated.

9.2 Subject to section 10, where a person's earnings or a portion of a person's earnings for a period of insurable employment remains unpaid for the reasons described in subsection 2(2) of the Insurable Earnings and Collection of Premiums Regulations, the person is deemed to have worked in insurable employment for the number of hours that the person actually worked in the period, whether or not the person was remunerated.

10.(1) Where a person's earnings are not paid on an hourly basis but the employer provides evidence of the number of hours that the person actually worked in the period of employment and for which the person was remunerated, the person is deemed to have worked that number of hours in insurable employment.

(2) Except where subsection (1) and section 9.1 apply, if the employer cannot establish with certainty the actual number of hours of work performed by a worker or by a group of workers and for which they were remunerated, the employer and the worker or group of workers may, subject to subsection (3) and as is reasonable in the circumstances, agree on the number of hours of work that would normally be required to gain the earnings referred to in subsection (1), and, where they do so, each worker is deemed to have worked that number of hours in insurable employment.

(3) Where the number of hours agreed to by the employer and the worker or group of workers under subsection (2) is not reasonable or no agreement can be reached, each worker is deemed to have worked the number of hours in insurable employment established by the Minister of National Revenue, based on an examination of the terms and conditions of the employment and a comparison with the number of hours normally worked by workers performing similar tasks or functions in similar occupations and industries.

> (4) Except where subsection (1) and section 9.1 apply, where a person's actual hours of insurable employment in the period of employment are not known or ascertainable by the employer, the person, subject to subsection (5), is deemed to have worked, during the period of employment, the number of hours in insurable employment obtained by dividing the total earnings for the period of employment by the minimum wage applicable, on January 1 of the year in which the earnings were payable, in the province where the work was performed.
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> (5) In the absence of evidence indicating that overtime or excess hours were worked, the maximum number of hours of insurable employment which a person is deemed to have worked where the number of hours is calculated in accordance with subsection (4) is seven hours per day up to an overall maximum of 35 hours per week.
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> (6) Subsections (1) to (5) are subject to section 10.1.

II. Analysis

[21] It is clear from section 55 that the computation of insurable hours according to Regulations 10(2) through (5) is not determinative and the question is to be determined by reference to the actual hours. Chief Justice Bowman of the Court in *Chisholm v. M.N.R.*, [2001] T.C.J. No. 238 (QL) wrote of Regulation 10 as follows:

> 15 Finally, I come to section 10 of the Regulations. It is a regulation authorized by section 55 of the *EI Act* to provide some assistance in determining how many hours have been worked by an employee in cases where there is doubt or lack of agreement between the employer and the employee or difficulty in determining the number of hours worked. It clearly is not intended to displace clear evidence of the type that we have here of the number of hours actually worked. To say that the rules set out in section 10 of the Regulations could prevail against the true facts would be to put a strained and artificial construction on this subordinate legislation that would take it far beyond what section 55 of the *EI Act* intended or authorized. Indeed subsections (4) and (5) of section 10 are premised upon the actual number of hours not being known or ascertainable, or upon there being no evidence of excess hours. That is demonstrably not the case here.
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> 16 I have found the decisions of Bonner J. in *Franke v. Canada*, [1999] T.C.J. 645, and of Weisman D.J. in *McKenna v. Canada*, [1999] T.C.J. 816, and *Bylow v. Canada*, [2000] T.C.J. 187, and of Beaubier J. in *Redvers Activity Centre Inc. v. Canada*, [2000] T.C.J. 414, of great assistance. They support the broad, and in my view, common sense conclusion that where there is evidence of the number of hours actually worked there is no need to have recourse to any other method.
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> [Emphasis added]

[22] Section 55 of the *EI Act*, which permits the making of such Regulations, is also clear that it is not required for the CRA to limit itself to the arithmetical application of these Regulations.

[23] It is also clear that Regulation 9.1 applies to hourly rate workers where their "actual hours" worked is known. Regulation 10(1) applies to those not paid an hourly rate such as piece rate workers. Regulations 10(2) through (5) set out guidances to determine actual hours for purposes of either 9.1 or 10(1).

[24] In this case, the Crown assumed and agrees that the worker is paid an hourly rate. However, it was not clear to the Crown at the EI review stage or the Rulings and Appeals stages what number of hours Mrs. Chahal actually worked and for which she was remunerated.

[25] It appears that even if Mrs. Chahal were not paid on an hourly basis, Regulation 10(1) would require evidence of the hours that person actually worked and for which she was remunerated. So, we would have the same issue.

[26] Regulation 10(2) applies if neither 9.1 nor 10(1) applies. That would be the case if the worker is not paid an hourly rate and the number of hours actually worked cannot be established with certainty. In such a case, subsection 10(2) provides that the employer and a worker or group of workers may agree on a number of hours that would normally be required to gain the earnings and that number becomes the number of insurable hours.

[27] Regulation 10(3) provides that where an amount agreed to by an employer and a worker or a group of workers is not reasonable, or no agreement can be reached, each worker is deemed to have worked the number of hours established by the Minister, based on an examination of the terms and conditions of the employment and a comparison of the number of hours normally worked by workers performing similar tasks or functions in similar occupations and industries.

[28] Regulation 10(2) appears to be a guidance to the employer for reporting purposes and Regulation 10(3) provides for the Minister's right to challenge that.

[29] Regulation 10(4) also appears to be written primarily from the point of view of an employer having to report. Regulation 10(4) provides that the insurable hours will be the amount obtained by dividing the person's total earnings by the applicable provincial minimum wage for the year. Regulation 10(5) provides that, unless there is

evidence indicated that overtime or excess hours were worked, the maximum number to be used for purposes of 10(4) is seven hours per day to a maximum of 35 hours per week. While the section is apparently written from an employer's perspective, the Minister is not precluded from having resort to this guidance either. Nor is the Court.

[30] Regulations 10(2) and (3) and Regulations 10(4) and (5) expressly only apply if neither 9.1 nor 10(1) applies. This means they only apply if the worker is not paid an hourly rate and the number of hours actually worked cannot be determined. This is not the case here since the Crown assumed she was paid an hourly rate and did not even try to mount a credible case that she was paid by the pound.

[31] Perhaps these guidances could also be useful if Regulation 9.1 or 10(1) cannot be applied because of a lack of adequate proof of hours actually worked.

[32] Regulation 10(3) would require the Minister to conduct both (i) an examination of the terms and conditions of the employment, and (ii) a comparison with the number of hours normally worked by workers performing similar tasks or functions in similar occupations and industries, before establishing the number of insurable hours. The evidence of the Crown only supports compliance with the first requirement and it is clear that no attempt was made to satisfy the second. Either of these requirements would logically have required some information as to the number of pounds or flats of berries that a worker can pick in a set period of time which may well depend upon the type of berry and the stage of the harvest season for that berry.

[33] In this particular case, virtually all of the evidence indicates that overtime or excess hours were worked in excess of seven hours per day or 35 hours per week. It would therefore have been necessary to use such number greater than 35 that the evidence indicates Mrs. Chahal worked. All of the evidence points to the fact she was picked up around 7 a.m. in the morning and returned home about 7 p.m. in the evening by the employer's driver together with other berry pickers. There is no evidence she did anything else during that time. She consistently said at the hearing and in her prior meetings with EI and CRA officials that she worked six or seven days a week except when it rained. The pay records, payslips, work logs and all of the other evidence further confirm that by recording four to ten-hour days being worked on this basis.

[34] Absent persuasive evidence that she was not paid by the hour but was paid by the pound, the number of hours she worked is unaffected by the number of hours her husband worked. I therefore find the CRA ruling that allowed her only 35 hours per week was entirely incorrect in the result it reached in her case.

[35] That does not decide the matter. I am left with the question of what were her insurable earnings and her insurable hours.

[36] In the circumstances of this case, it appears to me that the most satisfactory way to determine Mrs. Chahal's insurable earnings and insurable hours are to first determine her insurable earnings and then divide that by her agreed-to hourly rate to arrive at insurable hours. In doing this, it is necessary to determine what adjustment is required to reflect any of the earnings paid to her by ADP and her employer that was not paid to her in respect of her employment but was in respect of work done by her husband or her son. This approach of determining earnings using earnings to compute hours is far more sensible then beginning with a 35-hour maximum week and using that to determine earnings. This is amply evidenced by the fact that the Minister's approach has almost halved Mrs. Chahal's insurable earnings and insurable hours notwithstanding the evidence does not even suggest that her husband or her son worked hard enough to make up the difference.

[37] I therefore begin with the amount paid to her by her employer and ADP which is not in dispute. This amount is $8,190 for 2005 and $8,070 for 2006. Before dividing those numbers by the applicable hourly rate of $8.75 and $9 per hour respectively, I need to decide what adjustment, if any, must be made to them to reflect the contribution of her husband and her son based on the totality of the evidence. It is clear that the CRA ruling did not undertake this exercise. The ruling's insurable earnings amounts of $4,900 and $4,707 were arithmetically if not arbitrarily arrived at by dividing the hourly rate into the 35-hour maximum work week for the sixteen weeks. Accordingly, I have no hesitation in rejecting and ignoring the insurable earnings amount in the ruling.

[38] At the trial, the Crown did not put in any evidence beyond what is described above that would help in this determination. The Crown did not have a suggested approach, theory or number for me to consider or apply in determining the extent of Mrs. Chahal's husband and son's contribution to her earnings (or to her hours for that matter). I am therefore left to decide this based on what little evidence I have. Mrs. Chahal testified that the amounts on the ROEs represented her earnings and that her husband had been paid separately as a casual worker by the pound and in accordance with the employer's practice for the times he worked. He did not testify and no cheque or other corroborating evidence was produced. According to the Crown's evidence, Mrs. Chahal had earlier said her husband had helped her four or five times in 2005 (and on one occasion she said this regarding 2006). The Crown's evidence also indicated she had said her son had on one occasion helped her pick

berries at the end of the day. In the case of her son, there is no evidence before me whether the son's contribution helped Mrs. Chahal to meet her quota for the day and thus ensure her continued employment or perhaps, whether it allowed her to get paid for the day. The consistent evidence is that Mrs. Chahal's husband was not a well man, barely able to walk, and had difficulty seeing.

[39] In this case, the Crown again seeks to rely upon the onus on the taxpayer and the Crown's assumptions. In this case, each and every material assumption identified by the Crown, being assumptions (o) through (u), were the subject of evidence in Court on the topics addressed by those assumptions. In those circumstances, the ordinary rules of onus and persuasion apply in order that the Court may decide the case on a balance of probabilities. That is, once the taxpayer has put in *prima facie* evidence of her full-time employment and of the absence of any material help by others, and her payslips, ROEs, logs, etc. are also in evidence, it is up to the Crown to produce persuasive evidence in support of its position. If an Appellant's *prima facie* case is not particularly persuasive, the Crown may not need to introduce much evidence in any event.

[40] The Crown also sought to have me make inferences from the fact that Mrs. Chahal did not have either her employer or his driver attend and testify. As I pointed out at the time, I could just as easily make adverse inferences regarding the Crown's failure to call these two witnesses since the evidence was clear they had spoken with them, had made notes of the call, wanted to tell me about the meetings but did not want to introduce the notes nor, obviously, call them as witnesses.

[41] The Crown also suggested that since Mrs. Chahal testified that hours worked were recorded daily after review by her son on a calendar, that she should have been able to produce the calendar. To my mind, while that would have been fine evidence to receive, it is unreasonable to expect hourly workers to necessarily retain their calendar for years for which they have long since been paid and been able to confirm their pay cheques and pay slips against their own tracking of hours.

[42] The only other argument advanced by the Crown in support of the ruling's failure to recognize what the evidence consistently points out were Mrs. Chahal's hours of work during the berry season, was the possibility that Mrs. Chahal was not in fact paid by the hour but was paid based upon the weight of berries picked which was then somehow converted to an hour equivalence by agreement between her employer and herself. This would be contrary to the Crown's assumptions that she was paid by and worked by the hour. There would have been a significant onus on them to produce such evidence given that did not form the basis of the ruling

appealed from or the assumptions pleaded. Importantly, there was virtually no evidence led by the Crown to support this possibility. The fact that several government officials believe this may have been the case because they cannot imagine why else her daily pickings were weighed and measured against a possible quota, of which there is also no evidence, falls far short of what would be needed. In this case, and based upon the evidence introduced before me, the Crown cannot be successful with such a mere suggestion or supposition. Obviously, if this possibility and belief were in fact demonstrated to be correct, the Regulations 9 and 10 analysis would have been different and the result may well be different depending upon the reasonableness of the weight to hour conversion rate.

[43] In these circumstances, I cannot accept that the son's contribution at the end of one day in assisting his mother with her quota (whatever that means in this case) contributed in any relevant way to her insurable earnings or hours. Employers of hourly and salaried employees always monitor their employees' performance even though they are not paid on a piece rate basis. In the case of berry pickers, the weight of berries is an obvious productivity or efficiency measure for employers to track. The son's contribution may have done no more than help his mother keep her job for the future by meeting picking targets. That he did this once on one of the few days he came to pick her up at the end of the day instead of her taking the bus, it is hardly surprising. Indeed it would be a natural and normal occurrence amongst friends or family in comparable circumstances. If there was anything more to it, I certainly did not see any evidence of it.

[44] I do not believe that, on what evidence there is before me, Mrs. Chahal was never aided by her husband. However, even on the worst view of the available and accepted evidence described above, her husband worked with her on four or five occasions in 2005 and in 2006. There was no evidence he worked full days or at a capacity comparable to hers. In notes of her earlier conversations with government officials, she said he sat down through the day and he could not see well enough to pick all of the berries on a bush or plant. He could barely walk according to the officers' notes of her conversations. Assuming he worked on five occasions that year, for the equivalent of half-days allowing for his sitting down and his ailments, he would have only contributed 3% of her berries. Even if his contributions were relevant to her earnings or hours, I do not accept that such modest contributions of an accompanying spouse to Mrs. Chahal meeting her target or quota for berries can be considered to have had any material impact on her hourly earnings or hours worked. In any event, the evidence is consistent and clear that she worked between the hours of 7 a.m. and 7 p.m. for her employer and was paid for an eight or ten-hour day on an hourly basis.

[45] In these circumstances, I find that Mrs. Chahal's insurable earnings for 2005 to be $8,190 and her insurable hours for 2005 to be 936. For similar reasons, I find her 2006 insurable earnings $8,070 as reported on her ROE and her insurable hours to be 900. There was simply not any acceptable evidence before me to parse these numbers any finer having rejected the numbers in CRA's ruling and how they were arrived at.

[46] It is apparent from earlier Court decisions, notably Deputy Judge Rowe's decisions in *Parmar v. M.N.R.*, 2008 TCC 179, [2008] T.C.J. No. 164 (QL) and *Dadwal v. M.N.R.*, 2008 TCC 34, [2007] T.C.J. No. 569 (QL), as well as in the decisions in *Gill* v. *M.N.R.*, 2006 TCC 149, [2006] T.C.J. No. 253 (QL), *Khunkhun v. M.N.R.*, [2002] T.C.J. No. 483 (QL) and *Jawanda v. M.N.R.*, 2007 TCC 583, [2007] T.C.J. No. 396 (QL), that the government has concerns about the Employment Insurance program in the berry farm industry. It appears that if there is a problem, it lies largely with the possibility of unscrupulous employers taking advantage of their employees and our government EI program.

[47] If Canadian policy allows immigrant farm workers to come to Canada in their late sixties needing to work, and only able to work at demanding manual labour for minimum wage, one wonders how they really expect them to support themselves in their old age. Most jobs do not hire people in their seventies. While I am sympathetic to the government's difficult position, I must ask what is the benefit of putting an elderly couple through such an ordeal because they may have compassionately helped each other with the paid minimum wage work they do to live. There was no allegation that they were both trying to claim EI benefits at any point in time, much less for the same employment.

[48] I am not at all unsympathetic to the government's situation in such cases, however its focus on the individuals' EI claims and its reluctance to produce employers as witnesses or to produce evidence regarding productivity in the industry, which seems to be mandated by Regulation 10(3) for purposes of making rulings, does not look good on them. I would add to the recent comments and suggestions of Deputy Judge Rowe in another berry picker case that, after our senior government officials have reread John Steinbeck's *Grapes of Wrath*, they should be made to sit in this Court and hear these people's stories and then picture themselves in the role of judge in order to understand how poorly the government's positions aid the Court in determining the employees' actual hours worked.

[49] I should add that it would be equally open to the berry farm sector or to an organized group of employees to develop and introduce evidence relating to

productivity and efficiency of berry pickers to demonstrate the reasonableness and therefore apparent correctness of hours recorded in daily logs in circumstances where daily weight quotas are also monitored. It may be that the sector has no interest in introducing that evidence because it would not aid their workers. Absent any such evidence from either side, in this case I am satisfied that I have made my decision based on the best evidence available to me notwithstanding that it does not appear to be the best evidence that should have been available.

[50] I would reiterate my comments of last year in the *Jawanda* case regarding the inappropriateness of the Crown wanting largely to rely upon onus and assumptions in cases such as these. The unique tax laws relating to onus and assumptions were developed to reflect that, in most cases, it is the taxpayer who is best able to know, and introduce into evidence, the relevant facts and information. In cases such as these, where it is clear that there had been numerous investigations by federal and provincial levels of government into berry pickers and berry farm owners' practices, the reasons behind the rule of onus and assumptions are not so compelling. I have, however, applied them in any event.

[51] I will be allowing Mrs. Chahal's appeals for 2005 and 2006.

Signed at Ottawa, Canada, this 12th day of June 2008.

"Patrick Boyle"

Boyle, J.

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