Date: 20090402

Dockets: A-228-08
A-229-08
A-230-08

Citation: 2009 FCA 106

CORAM: **BLAIS J.A.**
EVANS J.A.
RYER J.A.

Docket: A-228-08

BETWEEN:

LAKHBINDER KAUR BAINS
(by her litigation guardian Swaran Singh Bains)

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

Docket: A-229-08

BETWEEN:

SWARAN SINGH BAINS

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

Docket: A-230-08

BETWEEN:

BALWINDER KAUR BAINS
(by her litigation guardian Swaran Singh Bains)

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

Heard at Vancouver, British Columbia, on April 2, 2009.

Judgment delivered from the Bench at Vancouver, British Columbia, on April 2, 2009.

REASONS FOR JUDGMENT OF THE COURT BY: EVANS J.A.

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Docket: A-230-08

BETWEEN:

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(by her litigation guardian Swaran Singh Bains)

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Vancouver, British Columbia, on April 2, 2009)

EVANS J.A.

[1] The appellants appeal from a decision of the Tax Court of Canada (2008 TCC 179) in which Deputy Judge Rowe allowed their appeals, in part, from a decision of the Minister of National Revenue determining their hours of insurable employment and insurable employment income from May to September 1997 for the purpose of the *Employment Insurance Act*, S.C. 1996, c. 23.

[2] The male appellant, Swaran Singh Bains, who is now nearly 80 years old, is the father of the female appellants, Lakhbinder Kaur Bains and Balwinder Kaur Bains, who have cognitive disabilities and are virtually illiterate. In 2007, they all worked as berry pickers, and performed associated tasks, on farms in the Lower Mainland of British Columbia.

[3] The Tax Court Judge heard their appeals, along with those of 72 other appellants, following an investigation by the Canada Revenue Agency into fraudulent schemes to enable berry pickers to increase the amount of employment insurance benefits that they claimed in the winter months when they were not working.

[4] He found that the appellants had worked more insurable hours than the Minister had determined, but less than the number of hours that appeared on the records of employment issued to two of the appellants by the employer, S & S Harvesting Ltd. ("SSH"). However, he refused to increase the amounts of the appellants' insurable earnings in order to reflect these extra hours of work.

[5] The Tax Court Judge found that, in order to obtain records of employment at the end of the picking season, the appellants had to endorse cheques made payable to them, allegedly as remuneration for their labour, and hand them back to the employer. These cheques, which the appellants endorsed in blank, were subsequently deposited into a bank account under the control of SSH or its guiding mind. They were for significantly larger amounts than the appellants would have earned, at their hourly rate of pay, for the extra hours of insurable employment allowed by the Tax Court Judge.

[6] The amount of EI benefits payable to a claimant is related to the amount of the claimant's wages. The appellants say that the Tax Court Judge erred when he refused to increase their insurable earnings to reflect the additional hours that he found that they had worked.

[7] The relevant statutory provisions are contained in the *Insurable Earnings and Collection of Premiums Regulations*, SOR/97-33 ("Regulations").

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	2. (1) Pour l'application de la définition de « rémunération assurable » au paragraphe 2(1) de la Loi et pour l'application du présent règlement, le total de la rémunération d'un assuré provenant de tout emploi assurable correspond à l'ensemble des montants suivants :
(*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, …	*a*) le montant total, entièrement ou partiellement en espèces, que l'assuré reçoit ou dont il bénéficie et qui lui est versé par l'employeur à l'égard de cet emploi;
…	[…]
(2) For the purposes of this Part, the total amount of earnings that an insured person has from insurable employment includes the portion of any amount of such earnings that remains unpaid because of the employer's bankruptcy, receivership, impending receivership or non-payment of remuneration for which the person has filed a complaint with the federal or provincial labour authorities, except for any unpaid amount that is in respect of overtime or that would have been paid by reason of termination of the employment.	(2) Pour l'application de la présente partie, le total de la rémunération d'un assuré provenant d'un emploi assurable comprend la partie impayée de cette rémunération qui n'a pas été versée à cause de la faillite de l'employeur, de sa mise sous séquestre effective ou imminente ou d'un non-paiement de rétribution à l'égard duquel l'assuré a déposé une plainte auprès de l'organisme fédéral ou provincial de main-d'oeuvre. Est exclu du total de la rémunération tout montant impayé qui se rapporte au temps supplémentaire ou qui aurait été versé en raison de la cessation de l'emploi.

[8] Despite the absence of direct evidence respecting these particular appellants, the Tax Court Judge found that it must have been understood by the appellants (or, more accurately, by the male appellant who spoke for himself and his daughters) that they had to endorse the cheques back to the

employer in order to obtain their records of employment, which they needed to be able to claim EI benefits. The Tax Court Judge also found that the appellants endorsed the cheques in blank and handed them over to an agent of SSH. The appellants no longer challenge these findings of fact.

[9] On the basis of these findings, the Tax Court Judge concluded that the appellants had not discharged their burden of proving on a balance of probabilities that they had "received or enjoyed" the cheques within the meaning of subsection 2(1) of the Regulations. Consequently, the amounts of the cheques could not be included in the appellants' insurable earnings. The records of employment issued to the appellants had misrepresented both the number of hours that they had worked and the amounts paid to them as wages.

[10] The appellants argued that the Judge erred in law in holding that they had not "received" the amounts of the cheques since they had physical possession of the cheques, albeit momentarily, regardless of whether they also "enjoyed" the proceeds of the cheques.

[11] We do not agree. Whether the facts as found by the Tax Court Judge fall within subsection 2(1) of the Regulations is a question of mixed fact and law. The Tax Court Judge decided that the appellants did not "receive" the amounts represented by the cheques when the cheques came into their physical possession solely for the purpose of being endorsed back and handed over to an agent of the employer. In the absence of any readily extricable question of law which he decided incorrectly, the Judge's decision can only be set aside for palpable and overriding error: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33.

[12] We are not persuaded that the Tax Court Judge made any such error in his application of the statutory language to the facts, which indicate that the appellants exercised no real control over the cheques.

[13] Nor are we persuaded that any general question of law arises about the interpretation of the words “received or enjoyed” which, in our opinion, are to be understood as having their ordinary meaning. The appellants argued that the Tax Court Judge erred in law by not treating as separate transactions the handing of the cheques to the appellants, and the appellants’ endorsing them in blank and returning them to the employer.

[14] We do not agree. The Tax Court Judge’s treatment of what transpired was based on the particular facts before him. In our view, it was entirely open to him to regard what happened as essentially one transaction.

[15] We would only note that subsection 2(2) of the Regulations provides that unpaid wages from insurable employment may be included in a claimant’s insurable earnings if the claimant has filed a complaint with the relevant labour authorities, a course of action that was presumably open to the appellants. Whether this recourse is still available to them we do not, of course, know.

[16] For these reasons, the appeals will be dismissed with costs.

"John M. Evans"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	A-228-08, A-229-08, A-230-08
APPEAL FROM A JUDGMENT OF THE TAX COURT OF CANADA DATED APRIL 16, 2008, DOCKET NO. 2002-177 (EI) (2008 TCC 179).	
STYLE OF CAUSE:	Lakhbinder Kaur Bains, Swaran Singh Bains, Balwinder Kaur Bains v. Minister of National Revenue
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	April 2, 2009
REASONS FOR JUDGMENT OF THE COURT BY:	(BLAIS, EVANS, RYER JJ.A.)
DELIVERED FROM THE BENCH BY:	EVANS J.A.

APPEARANCES:

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Michael Taylor Stacey Michael Repas	FOR THE RESPONDENT

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