

Dockets: 2006-2113(EI)

BETWEEN:

RAJWANT KAUR JAWANDA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeals of
Harbans Kaur Jawanda (2006-2114(EI)),
Davinder Jawanda (2006-2117(EI))
and *Suba Singh Jawanda* (2006-2118(EI))
on September 17 and 18, 2007, at Vancouver, British Columbia

Before: The Honourable Justice Patrick Boyle

Appearances:

For the Appellant: The Appellant herself

Counsels for the Respondent: Christa Akey
 Andrew Majawa

JUDGMENT

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

Signed at Ottawa, Canada, this 1st day of October 2007.

"Patrick Boyle"

Boyle J.

Docket: 2006-2114(EI)

BETWEEN:

HARBANS KAUR JAWANDA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeals of
Rajwant Kaur Jawanda (2006-2113(EI)),
Davinder Jawanda (2006-2117(EI))
and *Suba Singh Jawanda* (2006-2118(EI))
on September 17 and 18, 2007, at Vancouver, British Columbia

Before: The Honourable Justice Patrick Boyle

Appearances:

For the Appellant: The Appellant herself

Counsels for the Respondent: Christa Akey
Andrew Majawa

JUDGMENT

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

Signed at Ottawa, Canada, this 1st day of October 2007.

"Patrick Boyle"

Boyle J.

Docket: 2006-2117(EI)

BETWEEN:

DAVINDER JAWANDA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeals of
Rajwant Kaur Jawanda (2006-2113(EI)),
Harbans Kaur Jawanda (2006-2114(EI))
and *Suba Singh Jawanda* (2006-2118(EI))
on September 17 and 18, 2007, at Vancouver, British Columbia

Before: The Honourable Justice Patrick Boyle

Appearances:

For the Appellant: The Appellant himself

Counsels for the Respondent: Christa Akey
 Andrew Majawa

JUDGMENT

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

Signed at Ottawa, Canada, this 1st day of October 2007.

"Patrick Boyle"

Boyle J.

Docket: 2006-2118(EI)

BETWEEN:

SUBA SINGH JAWANDA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeals of
Rajwant Kaur Jawanda (2006-2113(EI)),
Harbans Kaur Jawanda (2006-2114(EI))
and *Davinder Jawanda* (2006-2117(EI))
on September 17 and 18, 2007, at Vancouver, British Columbia

Before: The Honourable Justice Patrick Boyle

Appearances:

For the Appellant: The Appellant himself

Counsels for the Respondent: Christa Akey
 Andrew Majawa

JUDGMENT

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

Signed at Ottawa, Canada, this 1st day of October 2007.

"Patrick Boyle"

Boyle J.

Citation: 2007TCC583
Date: 20071001
Dockets: 2006-2113(EI),
2006-2114(EI),
2006-2117(EI),
2006-2118(EI)

BETWEEN:

RAJWANT KAUR JAWANDA,
HARBANS KAUR JAWANDA,
DAVINDER JAWANDA,
SUBA SINGH JAWANDA,

Appellants,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Boyle, J.

Introduction

[1] These four appeals were heard together on common evidence. All of the Appellants' evidence went in through a Punjabi interpreter. The four Appellants are appealing determinations by Canada Revenue Agency of their insurable earnings and insurable hours under the *Employment Insurance Act*.

[2] Davinder Jawanda is appealing in respect of his employment with Bains Orchards in 2001. The other three are appealing with respect to their employment with Bains Orchards in 2000 and 2001.

[3] The four Appellants are related and all worked as employed orchard workers

tending trees and picking fruit and related activities. They were not related to the orchard owner. Their work was seasonal summer and fall work. Their rate of pay was \$9 an hour. The nature of the work was such that hours were not entirely regular and depended upon the weather.

[4] The Jawandas find themselves in difficulty because Bains Orchards paid them irregularly, in part by cheque, in part by money order or bank draft, and in part in cash. Bains Orchards kept inadequate and inconsistent records. Bains Orchards at the time was in difficulty with its own taxes for which collection action was being taken. The employer therefore tried very hard to use cash for sales and expenses, including payroll. Cash receipts were quickly used to buy money orders or bank drafts, including those used to pay his employees. Mr. Bains bought money orders and bank drafts from many different bank branches.

[5] The employer issued Reports of Earnings to employees for EI purposes that did not correspond precisely to the T4s issued; nor did these correspond to his T1 tax return, his withholding remittances or his business's books and records, such as they were.

[6] The four Appellants lived and worked together. Suba is the father and Harbans is his wife. Davinder is Suba's son and Rajwant is Davinder's wife. Davinder and Rajwant have three children. Davinder's mother also lives with them and cares for the children. At the time, they lived in a rented portion of a house together with two other siblings of Davinder.

[7] The CRA does not dispute that the Appellants were employees; nor does CRA take the position that the Appellants did not work, even though for two of the Appellants CRA determined the employees had no insurable earnings or hours for 2000. Indeed, the lead investigating officer from Human Resources and Development Canada said he saw three of the Appellants working in the orchard on each of his site visits in 2000. CRA does not suggest that any of the Appellants colluded in any way with Bains Orchards. The CRA witness believes they were taken advantage of by their employer, who did not pay them the wages they were entitled to for the work they did.

[8] It is the Crown's position that the Appellants' insurable earnings for EI purposes is what they can document they were paid by written evidence other than the ROEs and T4s issued to them by their employer. The Crown's theory is that the balance of the wages they were due were not paid in cash, or at all, but were unpaid wages. Unpaid wages are not included in insurable earnings unless a claim

has been filed with the appropriate Employment Standards Branch, which was not done. Thus, the Crown has only allowed insurable earnings to the extent of amounts paid by cheque or money order or bank draft, and has made no allowance for cash. CRA determined insurable earnings, grossing up the amounts received by cheque or money order for the required employee withholdings. CRA determined insurable hours by dividing that number by \$9 an hour.

[9] The employees' position is that to the extent the amount reported by Bains Orchards was not paid by cheque or money order, it was paid to them in cash. Since they were fully paid, although at times late, they had no need to file any labour complaints. The Appellants' position is that they kept adequate track of hours worked and amounts paid at the time to satisfy themselves they were fully and properly paid, but do not now have records beyond the ROEs, their T-4s and their income tax returns.

[10] The only issue is whether Bains Orchards paid some of the Appellants' wages in cash and, if so, how much.

[11] Each of the Appellants testified. The Crown called three witnesses, two from HRDC and one from CRA. Neither side called Mr. Bains or any other representative of Bains Orchards. While CRA had retained PricewaterhouseCoopers to complete a limited forensic audit of Bains Orchards, which was put in evidence, no one from PwC was called to testify.

Amounts in Question

[12] Davinder Jawanda's 2001 ROE issued by his employer is for \$10,935 of insurable earnings and 1,215 insurable hours. CRA had copies of Bains' cheques and money orders totalling \$7,200 which grossed up to \$8,563.35 of insurable earnings, which worked out to 952 hours.

[13] Suba Jawanda's ROE for 2000 was for \$8,973 of insurable earnings and 997 insurable hours. CRA determined each of these to be nil since they found no supporting cheques or money orders from Bains.

[14] Suba Jawanda's ROE for 2001 was for \$9,225 of insurable earnings and 1,025 insurable hours. CRA had cheques or money orders totalling \$6,200 which it grossed up to \$7,380.45 of insurable earnings, and 821 insurable hours. In the evidence presented by the Crown, there appears to have been a further cheque or

money order for \$1,000 which CRA had obtained and the Crown conceded will have to be allowed as additional net wages received by Suba Jawanda for 2001, which will increase his insurable earnings by somewhat more than \$1,000 to reflect employer withholdings.

[15] Harbans Jawanda's ROE for 2000 was for \$9,378 insurable earnings, and 1,042 insurable hours. CRA determined each to be nil since they found no supporting cheques or money orders from Mr. Bains. In evidence, it came out that CRA had not accounted for \$3,000 of cheques and money orders which CRA had obtained, and the Crown conceded will have to be allowed as additional net wages.

[16] Harbans' ROE for 2001 was for \$9,765 of insurable earnings and 1,085 insurable hours. CRA determined these to be \$4,306.94 and 479 hours.

[17] Rajwant Jawanda's 2000 ROE was for \$9,378 of insurable earnings and 1,042 hours. CRA's initial determination was for nil insurable earnings and hours. On objection to CRA, it was determined that Rajwant had received cheques and money orders representing \$1,202.65 of insurable earnings, and 134 insurable hours. In evidence, it came out that CRA had located a further \$1,000 cheque or money order, and the Crown conceded this should be accounted for as additional net wages.

[18] Rajwant's 2001 ROE was for \$9,765 of insurable earnings and 1,085 insurable hours. CRA determined those amounts to be \$3,548.70 and 395 hours.

Evidence of Wages Paid

[19] All four Appellants testified that they have been fully paid for their work in Bains Orchards at the amounts shown in the ROEs issued to them by Bains Orchards. All four testified that Suba Jawanda kept track of everyone's hours worked and amounts paid to ensure that was so. Both Harbans and Rajwant testified that they never spoke to Mr. Bains about money or received cash or cheques directly from him. This they chose to leave to their husbands to attend to. The husbands both testified that they pursued Mr. Bains regularly to ensure they were paid their wages, if not on time, at least currently enough for the family to pay its bills. This resulted in Mr. Bains often reaching for his wallet while at the orchards to give them cash in varying amounts. Most of it was said to be \$300 or \$400 but at times it was only one or two hundred, and at least once, when car

repairs were due, it was in the range of five or six hundred dollars.

[20] The PwC report makes it clear that Bains Orchards was highly motivated to do as much business, both sales and expenses, in cash. It concludes Bains Orchards could have received much of its revenue in cash. The PwC report does not negate the ability of Bains Orchards to have paid wages in cash. On the contrary, it is consistent with Bains Orchards paying cash wages. Given its limited mandate and limited scope of review, and absent a PwC witness, this report seems to be of little other help.

[21] In the case of Davinder Jawanda, the Crown challenged the Appellant on the earnings shown on the ROE issued by Bains as being several hundred dollars less than shown on the T4 issued by Bains. Since this difference is within the realm of statutory vacation pay, which appears from his application for unemployment benefits to not have been paid, I find this of little concern. The Crown also challenged Suba Jawanda on the fact that in his application for unemployment benefits, he answered "No" to question 22, which asked if he would get any other monies from his last employer, even though he had testified he was not fully paid for his 2001 work until some time in 2002. I place no significance on this. Firstly, the reference to "other monies" can only mean to the "earnings" in questions 17 and 19, and "vacation pay" in question 21. Since the "earnings" asked for is a rate per hour or pay period, seemingly whether or not yet actually paid, his answer is reasonable even if English had been his first language. More importantly, the examples of "other monies" one might be owed that are listed in question 23 are "bonus, severance pay, unemployment benefit, et cetera". If it was intended to pick up unpaid earnings covered by previous questions, that is far from clear.

[22] The Crown points out that none of the cash allegedly paid to the Jawandas was evidenced by deposits into their bank accounts. The Jawandas' testimony is that they spent most of their earnings on family expenses such as rent, car repairs and groceries. This is an entirely reasonable explanation. Rather than depositing cash, they were withdrawing cash from the cheques they had to deposit.

[23] At the time of their initial interviews in 2002 with HRDC, the HRDC interviewing officer testified she had been told by the Appellants they were not then fully paid. At the time of their later HRDC interviews, they told the second interviewing officer they were fully paid by that later time. The evidence of Suba Jawanda is that after the 2002 interview, Mr. Bains paid them the balance owing in several installments in cash. That would be consistent with CRA's views of Bains' general approach to delay in paying his employees one year in arrears

when he could. The responses at the initial interview are cause for concern, since they are key to the issue before the Court.

[24] The Crown's HRDC Punjabi interviewer/interpreter relied in evidence on the fact that these 2002 answers were given at the interview, and must have been correct, since the interview was in Punjabi and the English report she prepared was read to and signed off as correct by the Appellants. It is not correct to say that the contents and correctness of the interview report as written up by HRDC was signed off on by the Appellants as correct. The form only calls for the interviewer to sign that "This report and the use of the information were explained to the individual and a copy was provided". The interviewer signed this, as called for by the form. In addition, she appears to have had the Appellants sign beside her signature.

[25] Again, these are Canadian labourers who have limited abilities in the English language. I place little significance on their signatures beside the interviewer's beyond acknowledging they were made aware of the reason for the report and had been offered a copy. I note that the witness who prepared the reports had trouble with her testimony of what she was told. She first said categorically each one of them told her at the interview there were outstanding unpaid wages. She then said that for sure two or three of them said that to her. She had to be invited to review her reports to get her evidence in clearly on this point.

Analysis and Conclusions

[26] In the circumstances, I find the Jawandas gave credible evidence that part of their wages was paid in cash. This is consistent with the ROEs, their T4s and their tax returns. I do not think it reasonable to have an absolute expectation that \$9 an hour wage labourers will keep any greater records once they are satisfied they were fully paid for the hours they had worked.

[27] This is also consistent with the after-the-fact receipts or invoices that Mr. Bains produced for CRA, which indicated the Jawandas, in several months, were "paid" part of their wages in "cash". That Mr. Bains subsequently may have told CRA that he did not mean "paid" when he wrote "paid" and did not mean "cash" when he wrote "cash" does not detract from the Appellants' evidence, especially since it was hearsay in any event.

[28] This is also consistent with CRA's testimony that it was not uncommon in the agricultural sector for labourers to be paid in cash.

[29] It is also consistent with CRA's testimony, and the comments in the PwC report, that Bains Orchards was motivated for its own tax purposes to receive cash and spend it in its business.

[30] The Appellants could give specific examples of cash payments having been made to them by Bains, for example, when a large bill for specific car repairs had to be paid.

[31] I accept the evidence that a greater portion of the husbands' wages were often paid by cheque than their wives'. This appears to me consistent with the fact that it was the husbands' jobs to pursue Mr. Bains for payment.

[32] I give little weight to the wives' evidence of being paid. While they gave their testimony well and forthrightly, and I accept their other testimony, they both said they never received or saw the money personally, as it was left to their husbands.

[33] The combined effect of all this evidence in support of some part of the Jawandas' wages having been paid in cash is, for practical purposes, to shift the onus to the Crown to provide some evidence that this was not the case. This they have not even attempted to do. They maintain their position that, except to the extent the Appellants or Mr. Bains produced a cheque or money order, or bank draft, no wages were considered paid. This is in spite of the fact that no one for the Crown would even say that they genuinely believed that the Jawandas *never* received *any* cash from their employer.

[34] The Appellants put forward a relatively consistent version of events. In contrast, the combined investigatory, audit and search powers and resources of the CRA, HRDC and the B.C. Labour Department's Employment Standards Branch, aided by a PwC forensic audit commissioned by them, and after compelling Mr. Bains' information and records, appears to have resulted in no evidence that supports its position that no wages were paid to the Appellants in cash.

[35] The government instead seeks the security of its favoured position of the onus of proof being on the Appellants. In these circumstances, that is not an acceptable response. In the words of the HRDC lead investigating officer, PwC audit could not conclusively prove Bains' ability to make the cash payments to these individuals. At other times in his testimony, he referred to the need for "definitive proof". In these circumstances, that is not the appropriate test.

[36] I find the evidence that the Jawandas received part of their wages in cash entirely credible in these circumstances. Consequently, I find the CRA's position that further and better supporting evidence is required before they will allow any is unreasonable. The Jawandas testified they received the full amount shown on the ROEs in the cash to the extent it was not paid by cheque or money order. I find that to be the case. In any event, the Crown led no evidence and advanced no theory or argument on what portion of the wages could have been paid in cash. The Crown's only concessions were with respect to the further cheques that surfaced in their possession in the case of Suba, Harbans and Rajwant.

[37] I therefore find the Jawandas have satisfied their onus to show me they did receive payment of all of the amounts shown on their ROEs.

[38] I understand from the Crown's witnesses that Mr. Bains and Bains Orchards are the non-compliant rogues that were the real subject of their pursuit. The orchard labourers appear to have been more in the nature of unwitting collateral damage.

[39] I find in each case for the Appellants and vary the rulings in question to conform the insurable earnings and insurable hours to those shown on the ROEs in each case, and refer this back to the Minister for re-determination in accordance with these Reasons.

[40] I will issue my judgment probably in two or three weeks, when I have had an opportunity to review and edit as needed the Reasons given today.

Signed at Ottawa, Canada, this 1st day of October 2007.

"Patrick Boyle"

Boyle J.

CITATION: 2007TCC583

COURT FILE NOS.: 2006-2113(EI), 2006-2114(EI),
2006-2117(EI), 2006-2118(EI)

STYLE OF CAUSE: RAJWANT KAUR JAWANDA,
HARBANS KAUR JAWANDA,
DAVINDER JAWANDA, SUBA SINGH
JAWANDA AND HER MAJESTY THE
QUEEN

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: September 17-18, 2007

REASONS FOR JUDGEMENT BY: The Honourable Justice Patrick Boyle

DATE OF JUDGMENT: October 1st, 2007

APPEARANCES:

For the Appellants: The Appellants themselves

Counsels for the Respondent: Christa Akey
Andrew Majawa

COUNSEL OF RECORD:

For the Appellants:

Name:

Firm:

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