

Docket: 2002-680(EI)

BETWEEN:

JOGINDER SINGH RAI,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE

Respondent.

Appeal heard on common evidence with the appeals of *Meena Mann* (2002-1266(EI)), *Sohan Mann* (2002-1268(EI)) and *Gurdev Singh Chahal* (2002-1317(EI) and 2002-1318(CPP)) on December 2 and 3, 2002 at Vancouver, British Columbia,

Before: The Honourable Deputy Judge D.W. Rowe

Appearances:

For the Appellant:

The Appellant himself

Counsel for the Respondent:

Michael Taylor

JUDGMENT

The appeal is allowed and the decision of the Minister is varied in accordance with the attached Reasons for Judgment.

Signed at Sidney, British Columbia, this 21st day of February 2003.

"D.W. Rowe"

D.J.T.C.C.

Citation: 2003TCC79
Date: 20030221
Docket: 2002-680(EI)

BETWEEN:

JOGINDER SINGH RAI,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

AND

Docket: 2002-1266(EI)

MEENA MANN,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

AND

Docket: 2002-1268(EI)

SOHAN MANN,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

AND

Dockets: 2002-1317(EI)
2002-1318(CPP)

GURDEV SINGH CHAHAL,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

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

[1] The parties agreed their appeals would be heard on common evidence. Gurdev Singh Chahal and counsel for the respondent agreed that appeals 2002-1318(CPP) and 2002-1317(EI) would be heard together within the context of the common evidence procedure.

[2] The appellant, Joginder Singh Rai, (Rai) appeals from a decision – dated January 4, 2002 – issued by the Minister of National Revenue (the "Minister") wherein the Minister decided Rai's insurable hours - during his employment with Jaswinder Kooner (Kooner) - operating as Arun Contractors - (Arun) for the period of July 3 to November 12, 1999 - were 650 with insurable earnings in the sum of \$4,647.50.

[3] The appellant, Meena Mann appeals from a decision – dated January 4, 2002 – wherein the Minister decided her insurable hours – during her employment with Kooner for the period of August 5 to November 15, 1999 - were 490 with insurable earnings in the sum of \$3,503.50.

[4] The appellant, Sohan Mann, appeals from a decision – dated January 4, 2002 – wherein the Minister decided his insurable hours – during his employment with Kooner for the period of July 3 to November 15, 1999 - were 456 with insurable earnings in the sum of \$3,258.25.

[5] The appellant, Gurdev Singh Chahal (Chahal), appeals from a decision - dated January 4, 2002 – wherein the Minister decided his insurable hours – during his employment with Kooner for the period of January 5 to October 30, 1999 - were 717 with insurable earnings in the sum of \$5,126.55. In the same decision, the Minister also decided Chahal was not employed in either insurable or pensionable service with Kooner during the period of October 31 to November 15, 1999 on the basis there was no employer-employee relationship. The appellant filed a separate appeal – 2002-1318(CPP) pursuant to the provisions of the *Canada Pension Plan*.

[6] The decisions concerning insurable hours and the amount of earnings pertaining to each appellant were issued pursuant to the relevant provisions of the *Employment Insurance Act* (the "Act") and the *Employment Insurance Regulations*. (the "Regulations").

[7] Counsel for the respondent advised the Court that with respect to the appellant, Joginder Singh Rai, the Minister had re-examined the matter and decided the correct number of insurable hours was 838 with insurable earnings in the sum of \$5989.09.

[8] Counsel also advised the Minister had re-calculated the insurable hours of employment of the appellant, Sohan Mann and decided the correct number was 461 with insurable earnings in the sum of \$3,295.25.

[9] The appellant, Joginder Singh Rai, testified that he began working for Kooner – operating as Arun – in January, 1999 and his job involved washing and packing potatoes. During the winter months, the work was not steady but he began working more hours in June and then full time, beginning in July. The pay rate was \$7.15 per hour and he worked at different farms as directed by Kooner. There were no fixed hours of work and each day was dependent on weather and the amount of work required to be done in accordance with the demands of the growing season. Rai stated Kooner's wife recorded his hours of work. Kooner used a van to transport Rai – and other workers – to and from their homes and the work locations. Rai's work year had commenced in January with washing and packing potatoes, onions and beets. By March, he was planting new cranberries and weeding out old ones. In May, he was performing – more or less – the same duties but working fewer hours. Kooner would telephone Rai at home during the evening and advise whether his services were required the following day. For Rai's services in January and February, 1999, he stated he received one cheque and cash payments amounting to approximately \$2,300. One cash payment was \$1,300 and other smaller sums added up to about \$1,000. Kooner did not require him to sign a receipt for any cash payment. Rai stated he had maintained – in a diary - a record of hours worked and filed a photocopy thereof as Exhibit A-1. He stated he made an entry each day and when he completed the reporting cards - required in order to receive employment insurance (EI) benefits during the period between January and May, 1999 - he indicated thereon the number of hours worked during a particular period which had the effect of reducing the amount of the next EI payment. Rai stated he received one of the cash payments because his wife was about to depart for a trip to India and needed the money.

[10] Counsel for the respondent referred the appellant, Joginder Singh Rai, to a Record of Employment (ROE) – Exhibit R-1 – and Rai identified it as a document he had received from Mrs. Kooner. Rai noted the date of July 2, 1999 had been used as the first day of work - for purposes of completing the ROE - whereas he had worked at various times during the months of January through May. Rai estimated the proper insurable hours of work during his employment with Kooner was approximately

1,100. Rai stated he worked at various farms, including one owned by Brent Kelly and another one located in the municipality of Langley as well as at another farm where he looked after some cows. In the first two months of 1999, Rai recalled having worked a significant number of hours and had advised an official at Canada Customs and Revenue Agency (CCRA) - during an interview on May 25, 2000 - that he had recorded those hours on his periodic report cards - sent to the EI benefits claims office - but did not indicate to the interviewer that he only worked 5 or 6 days per month during this period compared to 6 days per week commencing in July, 1999. In November, the available work was reduced and his last day was November 12 when he was injured as a result of falling from a forklift. Rai agreed he had informed the individual dealing with his EI benefits application that the injury had occurred from a fall on some stairs because he thought the cause of the injury was not a significant matter and did not want to involve Workers' Compensation Board (WCB). An initial X-ray had not revealed any problem and he received treatment from a physiotherapist. The pain continued and he was examined by another doctor who discovered he had sustained a fracture. Rai stated he did not make any WCB claim even though the injury had occurred while working at Brent Kelly Farms Inc. (Brent Kelly Farms) while unloading some packing boxes. Rai stated he worked 12 or 13 hours on some days but on a couple of occasions had worked only two or three hours. Rai stated that although he had not provided the two CCRA interviewers with a copy of his recorded hours of work - for the period of July to November - he attended at the CCRA offices the next day - on May 26, 2000 - and had telephoned the office - the day after that - to confirm that said document had been received. Rai identified a letter - Exhibit R-2 - dated October 24, 2001- that he had sent to CCRA to which he attached a sheet upon which he had recorded his working hours as transcribed from his personal diary. Rai had begun working at the rate of \$7.15 per hour but that had been increased - at some point - to \$7.25, probably due to an amendment to the provincial minimum wage legislation. Photocopied sheets of several cheques - Exhibit R-3 - were shown to Rai and he acknowledged he had received them including one dated March 29, 1999 - in the sum of \$1,260 - which had been issued - by Kooner - for payment of work done since January, 1999. There was no accompanying stub to indicate whether deductions had been taken from a larger amount. The cheque dated July 15, 1999 - in the sum of \$652.43 - and the cheque dated July 31, 1999 - in the sum of \$637.97 - were both received by Rai at the same time and deposited into his account on August 26, 1999. The two cheques dated August 15 and August 30, respectively, were deposited on October 30, 1999. Rai stated he did not hold any cheques more than 4 or 5 days prior to making a deposit. The cheques dated October 15 and October 30, 1999, respectively, were not received until February 26, 2000. The cash - in the approximate sum of \$1,300 - was received in October or November but Rai did not record the exact date of that

payment nor a smaller payment of \$500 and other lesser amounts totalling approximately \$500. Rai recalled informing the interviewers he had received approximately \$1,800 in cash - for the 1999 year - and that he had also received some cash during the early part of 2000. Counsel informed Rai that the days he purported to work during April and May, 1999, did not seem to be the subject of any invoice by Kooner to Brent Kelley Farms. Rai indicated he would not have any knowledge of the billing methods used by Kooner but stated he did work at three different locations and was driven there by Kooner and/or his mother-in-law. When shown a comparison of Kooner's records of hours worked and his own, Rai stated he was not able to explain the differences in time for the months of July and August and cannot explain why - on days when he is certain he worked at a particular farm - that particular Arun client was never billed by Kooner. Rai stated there was an individual named Nick - an employee of Brent Kelly Farms - who supervised the work done at that location. In November, 1999, Rai recorded his hours of work - totalling 21 over the course of 4 days - while Kooner's records indicated Rai had worked 85 hours. Rai stated his records were correct for that period and Kooner's were wrong. When Rai received the ROE indicating a total of 980 insurable hours, he accepted it and presented it to the EI office as a basis for applying for EI benefits even though he knew he had worked more hours than stated, commencing in January, 1999, rather than July.

[11] Meena Mann testified she worked for Kooner and was paid the sum of \$7.15 per hour. She received all her pay in the form of cheques and worked exclusively on the Brent Kelly Farms property where she was supervised by either Kooner or Nick. Her duties which included grading potatoes and weeding were performed 6 days per week, excluding Sundays. Kooner or his driver drove her to and from work. Depending on need, the hours of work varied from 4 to 10 per day and she recorded her time on a calendar she has since discarded. During the relevant period, she had to visit her doctor on several occasions and stated she would not have worked during those days. Mann agreed that her ROE stated she worked a total of 730 insurable hours but she did not examine it upon receipt but merely took it to the EI office. She stated she provided the EI office with a record of her hours worked but it was not as originally recorded on her calendar because she had since moved and it had been thrown out.

[12] In cross-examination, Meena Mann was referred to her Notice of Appeal in which she stated she had begun working for Kooner on June 4, 1999, although her ROE refers to August 5, 1999 as her commencement date. Her baby was born on January 3, 2000 and the number of insurable hours - as recorded on her ROE - Exhibit R-4 - entitled her to maternity benefits. She recalled having been interviewed

by CCRA employees - Nav Chahan and Harby Rai – on May 25, 2000. At that time – acting on advice received from Kooner – she told them that she had not recorded her hours of work. Meena Mann was referred to Schedule B of the Reply to her Notice of Appeal (Reply) in which certain dates and hours worked according to her records and those of Kooner were set forth. On 3 days between August 5 and November 5, 1999, Meena Mann had recorded working 9 and 10 hours per day, respectively, but the Arun records maintained by Kooner either showed she had not worked or there was no record of any hours. Meena Mann stated she had visited her family doctor in relation to her pregnancy and also had attended at another location in order to obtain an ultrasound. Although she had received a total of \$5,219.50 from Kooner, the cheques had not been received promptly for a particular pay period. A photocopy of cheques – Exhibit R- 5 – was shown to Meena Mann and she acknowledged having deposited two cheques - dated August 15 and August 30, 1999, respectively - on October 26, 1999. She was not aware of the number of hours covered by those payments. The cheques dated September 15 and September 30, 1999, respectively, were not deposited until December, 1999, about the same time as the deposit of two other cheques dated October 15 and October 30, 1999. She agreed the cheques did not seem to be in sequence since the cheque dated September 15, 1999 was #0199 and the next cheque – dated September 30, 1999 - was # 0197. The cheque dated October 15, 1999 was #0176, while the one dated October 31, 1999, was # 0192. The last cheque – dated November 15, 1999 – was # 0190. Meena Mann identified her application for EI benefits – Exhibit R-6 – that she had completed – and signed - on December 8, 1999. She also acknowledged having completed a Questionnaire - Exhibit R-7 – dated August 30, 2001 – and returning it to CCRA. She attached a separate sheet on which she had recorded hours worked, including days upon which she had visited her doctor, as set forth at Schedule B of the Reply. Counsel suggested to Meena Mann that she had recorded a total of 67 hours worked during times when she was not present according to records maintained by Kooner. Mann replied she did not know the reason for such discrepancy but believed her employer had not been honest in dealing with her. Counsel pointed out that for the month of October, 1999, the records - relied on by her - and those kept by Kooner were at odds with each other for a total of 20 days. Counsel also referred Meena Mann to documents produced by Kooner which indicated he had not invoiced Brent Kelly Farms for days during October, 1999 when she maintained she had worked at that location. Meena Mann stated she had worked with 7 or 8 other people at Brent Kelly Farms and that as many as four people would ride together in the van. She recalled working with Gurbax Sanghear and an older couple she referred to only as "Uncle" and "Auntie", in accordance with custom in the Indo-Canadian community. She maintained she had worked a total of 92 days in November, 1999 even though the records of Arun do not reveal any billing to Brent Kelly Farms for labour provided by Arun workers during

that month. She stated she worked for Kooner alongside her father – Sohan Mann - and her mother. Her father had begun working for Kooner, followed by her mother and then she had joined them. She denied the suggestion of counsel that Kooner had issued her an ROE showing sufficient hours to entitle her to maternity benefits even though she had not actually worked those hours. She also denied that some hours actually worked by her father had been attributed to her by Kooner – for purposes of the ROE - in order to accumulate enough insurable hours for the benefits sought.

[13] Sohan Mann testified he worked for Kooner - beginning in May, 1999 – even though the relevant period relating to his appeal from the decision of the Minister pertained to the interval from July 3 to November 15, 1999. He began working at \$7.15 per hour and his duties – in June – were performed with respect to potatoes and cranberries. He stated he had received payment only by cheque and had recorded his hours of work on a calendar, a copy of which he had provided to CCRA investigators. According to his own records, he had worked a total of 982 hours. When he received his ROE from Kooner, he attended at Kooner’s house, requested additional pay and complained that Kooner had not accurately recorded the hours worked. However, Kooner did not agree to make any revisions. Sohan Mann stated he had never been able to match up his hours worked with the pay cheques received from Kooner. His first pay cheque was given to him in August, 1999 and he estimated he may have held it for two weeks prior to negotiating it. After receiving a total of 6 cheques from Kooner, Sohan Mann calculated he was owed the approximate sum of \$3400. He worked at Brent Kelly Farms and at two other places. At the Brent Kelly Farms property, there were – on occasion – as many as 12 people working inside the buildings and an even greater number working outside in the fields. He stated he sometimes worked on Sundays and had performed services pertaining to a variety of produce, including cranberries, potatoes, onions and wheat. After starting work – in May – for Kooner, he was then joined by his wife and later his daughter, Meena Mann so that the three of them eventually worked together.

[14] In cross-examination, counsel referred Sohan Mann to his ROE - Exhibit R-8 – which reported the number of insurable hours was 990 with insurable earnings in the sum of \$7,078.50. Mann stated the commencement date of July 2, 1999 was incorrect because he had begun working in May - on an irregular basis - and the hours had been increased in June. He stated he was laid off in December, 1999 and had worked 8 days in a greenhouse for someone whom he assumed was a client of Kooner since it had been Kooner who called to direct him to that location. He had never been paid for that work. Throughout his employment with Kooner, he had recorded his hours of work on a calendar, a copy of which he stated he had provided to CCRA investigators. Mann identified a Questionnaire – Exhibit R-9 – he

had completed and returned with an attached sheet indicating hours worked. However, the sheet was not a photocopy of his calendar – which had been lost - but appeared to be a statement of his hours, prepared by someone. Mann stated he had been pressured – by Kooner – not to provide details to government interviewers concerning his employment with him, operating as Arun. Mann acknowledged receipt of 4 cheques, as photocopied onto a sheet – Exhibit R-10 - but stated there had also been two more cheques paid to him. As for attempting to collect additional pay from Kooner, Mann stated he had not been aware of the Employment Standards Branch, an agency of the provincial government.

[15] Gurdev Singh Chahal testified he received a decision from the Minister pertaining to two separate periods of employment with Kooner. The first was from January 5 to October 30, 1999 and the Minister decided he had worked 717 insurable hours with insurable earnings in the sum of \$5,126.55. Later, as set forth in the Reply to Notice of Appeal, the Minister conceded the correct number of insurable hours was 849.25 and insurable earnings were in the sum of \$7,662.41, as calculated in accordance with section 2 of the *Regulations*. The Minister decided he was not in pensionable and/or insurable employment with Kooner during the period of October 31 to November 15, 1999. Chahal stated he began working in the first week of January, 1999 – at Brent Kelly Farms – but did not keep track of his hours. Kooner or a driver picked him up and drove him to and from work. His pay was almost always late and he would attend at Kooner’s residence in order to receive a cheque for work done. Although his pay records indicate he was being paid the sum of \$7.25 per hour, Chahal stated he was receiving the lesser sum of \$7.00 and, when he complained to Kooner, was threatened with dismissal. Concerning the arrears in wages, Kooner assured him that - at some point - he would be paid in full. When Kooner’s wife handed him the ROE, he assumed it was correct. In the summer of 1999, he left work for an extended period, returned on August 16th and then worked until his layoff on November 15, 1999. Chahal stated he had worked for several farm labour contractors since arriving in Canada in 1995.

[16] In cross-examination, Gurdev Singh Chahal identified his ROE – Exhibit R-11 – indicating his insurable hours were 1,197.50 . He recalled being interviewed by Harby Rai and Chahan - whom he knew to be employees of CCRA - and advised them he had worked at Brent Kelly Farms and also at a farm that had some cows. He stated Kooner had told him to say he had been paid every 15 days and to advise CCRA officials that he had been paid \$7.15 per hour. Chahal responded to Kooner’s suggestions by stating he was prepared to tell the truth to the interviewers - which was that his cheques were always late – but when Kooner threatened to fire him, agreed to follow Kooner’s advice. He stated there were some days when he worked

12 hours and it was usual for the work day to begin at 6:00 a.m. and to finish at 8:00 p.m. unless it was affected by weather conditions. He worked 4 or 5 days a week from January until May 15, 1999, when he left for England. He returned to Canada on August 15 and went to work the following day. Chahal identified his application for EI benefits– Exhibit R-12 – which had been completed by Mrs. Kooner because he cannot read nor write. He acknowledged receipt of the cheques, as shown in a bundle of photocopies – Exhibit R-13 – all of which were deposited into his Canada Trust account at a branch that remained open until 8:00 p.m. The cheque dated January 15, 1999 – in the sum of \$819.00 – was in payment of 117 hours of work at the rate of \$7.00 per hour. The cheque dated March 15, 1999 – in the sum of \$479.74 – was deposited in his account on May 4, 1999. One cheque – dated March 31, 1999 – in the sum of \$204.50 – was deposited on April 15, 1999 and the other – in the sum of \$346.69 – was not negotiated until May 4, 1999. Cheques were always late and the cheque dated August 31, 1999 was not given to him until October 18, 1999 when he deposited it to his Canada Trust account. The cheque dated September 15, 1999 – in the sum of \$1,000 – bore the notation "advance pay" but it was not delivered to him until November 10, 1999. He was aware there was no such policy in place for receiving advance pay from Kooner and did not know whether any deductions had been taken from that cheque. Chahal stated his own calculation of insurable hours produced a total of 1,147 - up to November 15, 1999 - and he believed his pay rate had remained at \$7.00 per hour throughout his employment.

[17] Harby Rai testified she is a CPP/EI Rulings Officer and has been employed by CCRA for 15 years. In June, 1999, she became a member of the Agricultural Compliance Team (ACT or Team) which includes members of the provincial Employment Standards Branch. ACT visited farms and greenhouses, interviewed workers, handed out pamphlets and engaged in discussions with employers. Under provincial legislation, the employer is required to maintain a daily log of workers on site. On August 18, 1999, ACT visited Brent Kelly Farms but none of the appellants in the within appeals were among the workers at that site outside in the fields or inside the barn where workers were grading potatoes. Copies of a pamphlet – Exhibit R-14 - concerning pay and working conditions – written in English and Punjabi – were provided to workers and they were advised to maintain – and retain – some personal record to demonstrate the hours worked. When an individual made a claim for EI benefits, Human Resources Development Canada (HRDC) would issue a letter advising that a CCRA representative might be present at any future interview. Rai stated she spoke – in Punjabi – to each of the appellants in the within appeals and requested records of hours worked. Meena Mann advised she no longer had such a record available but Joginder Singh Rai stated he did have a record of hours worked and promised to drop it off at the CCRA office. Harby Rai stated she never received

any such document. Kooner had provided CCRA with copies of cancelled cheques - paid to workers - as well as a daily log. Team and HRDC made a joint demand for payroll records for the period between September 1, 1998 and April 1, 1999. Another audit pertained to the period between April 17 and September 1, 1999 and another covered the balance of the year. Harby Rai stated she also examined computer print-outs and other relevant documents relating to payroll. A bundle of daily time sheets - Exhibit R-15 - covering the period of January 3 to September 2, 1999 were examined by Rai and she noted the sheets did not comply properly with provincial labour standards which require an entry to be made indicating the worker's name, start and finish times and the location of the work performed. A bundle of time records - Exhibit R-16 - had been maintained by Kooner in relation to work done by each of the appellants. A computer print-out - Exhibit R-17 - had been obtained from Kooner's accountant and it set out the rate of pay and the work commencement date of each worker. In the course of her investigation, Harby Rai stated she interviewed clients of Kooner - operating as Arun - and obtained copies of Arun invoices to Brent Kelly Farms which were based on a number of hours worked without identifying the names of the actual labourers. A bundle of invoices - Exhibit R -18 - sent by Arun to Brent Kelly Farms - for the months January through April, 1999 - indicated the number of hours that had been billed each month at a rate of \$8.50 per hour. An additional set of invoices - Exhibit R-19 - pertained to the period from May to November, 1999. Using the information gathered from various sources, Harby Rai used her computer and an Excel program to enter data onto a spreadsheet in order to ascertain if there were discrepancies in recorded hours of work. She produced an analysis - Exhibit R-20 - covering the 1999 year as it related to work allegedly done for Brent Kelly Farms and two other entities known as Eagleview and the Langley Farm. Rai referred to a sheet accompanying an invoice sent by Arun to Brent Kelly Farms for the month of January, 1999 - contained in Exhibit R-18 - indicating that 6 persons had worked a total of 54 hours on January 4, 1999. However, there was no corresponding time sheet for that day to support the contention that any worker had provided services at any location whatsoever. In January, 1999, Arun invoiced Brent Kelly Farms for a total of 562.8 hours labour but only 270 hours can be discovered from an examination of Kooner's payroll records and only 120 hours are supported by adding the separate amounts shown in the daily logs (Exhibit R-15), In February, 1999, Arun invoiced Brent Kelly Farms for a total of 1,575.3 hours labour but only 221.5 hours are supported by entries in the daily logs and the number of hours worked - according to the computerized payroll records - Exhibit R-17 - was 588. In July, 1999, Brent Kelly Farms was billed - by Arun - for having supplied 2,498.5 hours labour. During that month, Arun also billed Eagleview for a total of 420 hours for a total labour supply of 2,918.5 hours. However, the Arun payroll records indicated a total payment - to workers - based on a total of 3,305.5 hours. In

August, 1999 Arun billed out a total of 2,536 hours but purported to have paid wages to workers based on a total of 3,689.5 hours. Daily logs or other record of hours were not maintained in accordance with requirements of provincial employment standards legislation. In October, 1999, Arun's only client was Brent Kelley Farms and it was billed for 2,298.5 hours labour. However, the payroll records indicated Kooner's employees had worked 2,762 hours during that month. In November, 1999, Brent Kelly Farms was billed for 560.5 hours labour but 1,335 hours were entered on Arun payroll records. There was no other labour provided to any other customer that month. In December, 1999, Brent Kelly Farms was billed for 1,774.5 hours but payroll records support a total of only 240 hours labour had been provided by the pool of workers. Returning to an analysis of the month of May, 1999, Harby Rai referred to invoices by Arun - to Brent Kelly Farms - for 360 hours labour and 53 hours billed to Eagleview for a total of 503 hours. However, no worker appears on the Arun payroll records for that month. In June, 1999, the total hours invoiced to Arun clients was 1,212 but there is no record of any worker having been on the payroll and no daily logs were produced. In conversations with Brent Kelly, Rai stated she was informed that Nick Hothi - an employee of Brent Kelly Farms - kept track of the workers supplied each day by Arun and recorded the number of hours worked. Later, those records were used to verify the accuracy of an invoice submitted by Arun and - if correct - payment would be issued based on that amount. Harby Rai stated she had requested documents - from Mrs. Kooner - for the months of May and June, 1999, but none were forthcoming. Rai prepared a spreadsheet - Exhibit R-21 - based on the appellants' hours as recorded on the sheets - Exhibit R-16 - which had been received from Kooner. The entries did not match those contained in the computer print-out - Exhibit R-17 - obtained from Kooner's accountant. In August, 1999, Gurdev Singh Chahal, Meena Mann and certain other named workers were listed on the print-out as having been employed but none of them is the subject of any entry in the daily logs. In respect of the appellant, Meena Mann, the ROE was prepared by Kooner's accountant using the number of insurable hours - but a month by month examination revealed the daily log had recorded her hours as 227 even though the print-out was based on 235 hours. For the month of September, 1999, the Arun payroll records were based on a total of 3,862 hours but the computer print-out indicates a total of 4,209 hours was the purported basis of payments to employees. In that sense, it would appear that Kooner paid for 347 hours of work that had not been done or - at least - had not been recorded. However, for the same month - as disclosed by Exhibit R-20 - Arun billed out 4,437.5 hours of labour to Brent Kelly Farms and Eagleview. For the month of October, 1999, Harby Rai's analysis revealed 2,762 hours of work had been done - if one were to accept the accuracy of the daily time sheets - but the computer print-out stated the total was 2700 hours while 2,298.5 hours was the number used as the basis for invoicing Arun

clients. In November, 1999, the daily time sheets totalled 1,335 hours while the computer print-outs were based on 1,340 hours. However, the only Arun client that month was Brent Kelly Farms and it was billed for only 560.5 hours labour. In Rai's opinion, it is not an onerous task for an employer to maintain adequate – and accurate – records. In the course of her analysis, she considered the records of Brent Kelly Farms and/or Eagleview to be the most reliable because Nick Hothi – at Brent Kelly Farms - had verified the hours worked and the accuracy of the invoices submitted by Arun and it was not reasonable for those businesses to have paid Arun for workers who had never attended at the farms in order to supply labour. Harby Rai stated she interviewed all the appellants. Joginder Singh Rai advised her that he had started working for Kooner - in January, 1999 - not in July - as shown on the ROE. However, he had received a cheque in the sum of \$1260 - dated March 29, 1999 - from Kooner which indicated – to Harby Rai – that he had been working earlier, as claimed. Joginder Singh Rai told her that he would drop off his time records but failed to do so. When referred to Exhibit R-2 – containing sheets on which hours had been recorded – Harby Rai stated she had not seen them until produced in Court during the hearing of the within appeals nor had she ever seen – earlier - the time sheets contained in Exhibit A-1. According to the entry in Exhibit A-1, Joginder Singh Rai worked 10 hours on July 1, 1999 but the payroll records – Exhibit R- 16 - indicate he did not begin work until July 3 when he worked for 8 hours. On July 8, 1999, he recorded that he worked 10.5 hours but the Kooner records do not indicate any hours worked. Joginder Singh Rai had reported that Kooner paid him a total of \$1,800 in cash but Kooner denied – in conversations with Harby Rai - ever having paid any cash to any worker and there were no records to support that any such cash payment had been made. No records were ever forthcoming - from Kooner – to indicate the method by which Rai's pay cheques had been calculated. Harby Rai stated her examination of relevant records pertaining to the appellant, Gurdev Sing Chahal, disclosed the ROE used January 5, 1999 as his starting date but the record of daily hours – Exhibit R-21 – indicated he did not begin work until January 7 when he apparently put in an 11-hour day. Chahal did not maintain his own record of hours worked but advised CCRA that he had departed Canada on May 15, 1999 and returned on August 14th, 1999. However, Harby Rai pointed out that – after April, 1999 - Chahal does not appear on Kooner's payroll records for the following month of May and there are no daily hours recorded for Chahal for any period after his return to work in August. According to the payroll print-out, Chahal worked 220 hours in August but he only returned to work on the 16th which would make it improbable that he had worked so many hours in the 15 days remaining in the month. According to Chahal's ROE, he earned the sum of \$8,204.00 but the total amount of pay cheques issued to him – by Kooner – is only \$6,285.00. Since the position of both Chahal and Kooner was that no cash was ever paid for services performed,

Harby Rai was unable to reconcile this difference to her satisfaction. Chahal told Rai that he would wait a month or more prior to depositing his pay cheques and did not mention – during the interview – that Kooner had been late in paying wages. Under the circumstances, having regard to the unreliability of time records, Harby Rai stated an appropriate method of calculating Chahal's insurable hours would be to divide the total amount paid to him by the amount of the minimum wage. Following October 30, 1999, Chahal does not appear on any of Kooner's records. The computer-produced sheets - Exhibit R-17 – do not indicate any payment to Chahal after that date but does show the total of wages paid to Chahal was in the sum of \$7,596.88. That amount - divided by the minimum wage of \$7.15 applicable for that period – produces 1,062.5 insurable hours of employment. This number is at odds with the one used in the ROE which was based on total earnings of \$8,204.50 and 1,147.5 insurable hours. Harby Rai had also interviewed the appellants, Meena Mann, her father - Sohan Mann – and her mother – Jasbir Kaur Mann - concerning their employment with Kooner. Jasbir Kaur Mann had advised that her starting date was July 2, 1999 and that her husband and daughter had begun working at the same time. The Minister agreed to a consent judgment being issued with respect to Jasbir Kaur Mann pertaining to the period of July 2 to November 15, 1999 based on 975 insurable hours with total earnings in the sum of \$6,971.25. Rai stated Meena Mann had never produced any time records but had produced the list of hours as attached to Exhibit R-7. Meena Mann was not at the Brent Kelly Farms property on August 18, 1999 when ACT had visited the site pertaining to its mandate to monitor compliance with employment and labour standards in the agricultural industry. However, Mann's own records indicate she was at work that day, although she later agreed she might have been visiting her doctor. Rai's examination of the various documents indicated Sohan Mann did not appear on Arun payroll records until July 3, 1999 – the starting date used in his ROE – but he stated he had started working much earlier. He told Rai he maintained a record only for the purpose of adding the total amount during a specific period, after which it would have been discarded. The hours - as recorded on sheets attached to Exhibit R-9 - were not prepared by him or by a specific person known to him and he told Rai he had not seen that document. Rai stated the initial decision by the Minister was based on subsection 10(5) of the *Regulations* but it was later recognized that the inherent limitation restricting the worker to a 35-hour week was not appropriate within the context of the agricultural industry. Team had been formed in order to educate farm workers of their rights as instances had been discovered where people worked hard for months, received cheques - for which they obtained cash – only to hand the money back to the payor. In the past, Team had encountered workers who had worked for an entire season, receiving only an ROE as payment for their services in order to qualify later for EI benefits. During interviews with workers, it was common

for people to report working only 8 hours per day but Rai considered this response was routinely offered in order to avoid raising any issue of overtime pay or to cause further inquiry concerning a potential lack of compliance - by the employer - with labour standards under provincial law. Team attempted to verify the location of the third work site in Langley because an examination of the Arun records revealed a total of 10 hours had been spent there by the workers.

[18] In cross-examination by Joginder Singh Rai, Harby Rai stated she had not been in a position to become aware of whether he had reported income on his regular EI report cards for the months of January to May, 1999, inclusive.

[19] In cross-examination by Sohan Mann, Harby Rai stated she had undertaken steps to confirm the existence of the farm in Langley but no records were forthcoming from Kooner in that regard. She stated she did not recall Mann having told her – during the interview – that Kooner owed him money.

[20] In cross-examination by Gurdev Singh Chahal, Harby Rai agreed he had produced a cancelled cheque in the sum of \$498.80 – dated November 15, 1999 – issued to him by Kooner. The cheque had been negotiated on January 10, 2000.

[21] Joginder Singh Rai submitted that he had been working for Kooner, as related in the course of his testimony, and that he was entitled to recognition for the appropriate amount of insurable hours and insurable earnings notwithstanding the lack of accuracy in the records Kooner was supposed to maintain.

[22] The remainder of the appellants declined to offer any submissions.

[23] Counsel for the respondent submitted the Minister was relying on section 9.1 of the *Regulations* and had conceded section 10 did not apply to the circumstances relevant to the within appeals. Counsel submitted section 9.1 has a double threshold in that the appellants – first - must have performed the work and - second – must have been paid for that work unless the arrears in wages was covered by subsection 2.2 of the *Insurable Earnings and Collection of Premiums Regulations* which required a worker to have made a complaint before an appropriate tribunal in respect of such unpaid wages. Counsel pointed out no such complaints had been made to the provincial Employment Standards Branch by any of the appellants. As a result, the key finding of insurable hours and total earnings must relate to hours actually worked - and paid for - by the employer. Pursuant to the national scheme for employment insurance, the number of insurable hours qualifies someone for benefits, the amount of which is based on the insurable earnings. Counsel submitted it was

apparent Kooner – operating as Arun – had not maintained proper records and the multiple documents produced did not reconcile with each other or to the various ROEs issued to the appellants. In the end, the only reliable record of payments is disclosed by the cancelled cheques because there was no proof that cash had ever been paid to Sohan Mann or any other appellant in these appeals. As a result, counsel submitted the evidence supported the following findings with respect to insurable hours and total earnings:

Joginder Singh Rai – 838 hours with earnings in the sum of \$5,989.09 between January 5 and November 12, 1999.

Meena Mann: 663 hours with earnings in the sum of \$5,291.51.

Sohan Mann: 461 hours with earnings in the sum of \$3,295.05.

Gurdev Singh Chahal: 1065 hours with earnings in the sum of \$7,662.41.

[24] Counsel submitted there was no evidence supporting Chahal's claim with respect to the so-called second period of employment with Kooner from October 30 to November 15, 1999. Counsel also submitted that the various ROE's were incorrect and the only reasonable method of calculating the insurable hours and earnings was to refer to the cancelled cheques as the only proof of payment and then to divide that amount – in each case – by the applicable minimum wage of \$7.15 per hour. Unpaid wages – even if owing – could not be used for that calculation unless the exemption in section 9.1 of the *Regulations* had been met. Counsel submitted the appellants were complicit in the arrangement with Kooner and their only concern was in obtaining EI benefits for which they were quite prepared to be less than truthful during interviews with CCRA officials and as revealed by their obvious lack of desire to maintain personal records of hours worked which – if available - could have been used to support their claims.

Regulations 9.1 and 9.2 are as follows:

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.

[25] There have been numerous appeals concerning the insurability of farm and orchard workers and often there is a common thread attributable to language barriers, a lack of awareness by workers of their rights and the conduct of employers who deliberately choose not to abide by labour standards including proper documentation of hours worked, rates of applicable pay, overtime, and the requirement to pay wages on a regular basis for work performed during a preceding period. Often – as in the within appeals – some witnesses require the services of an interpreter – and it is difficult to explain the process that must be followed in order for an appellant to establish – on a balance of probabilities – that there was insurable and/or pensionable employment and that the workers earned the amount set forth in the relevant ROE in return for having performed a certain number of hours of work. In the within appeals, I am not satisfied with the accuracy of any of the so-called time records maintained by any of the appellants who purported to do so. In the case of Sohan Mann, he does not know who prepared the sheet containing a list of hours worked. Meena Mann stated she kept a record of hours on a calendar which is no longer available. Joginder Singh Rai testified he used a calendar to record hours and then transcribed those entries onto some sheets which he alleged had been provided to the local CCRA office investigating his case. The evidence adduced on behalf of the respondent did not support that claim. It is obvious – as demonstrated by the evidence of Harby Rai - the CCRA official – that each time one attempts to find corroboration on matters such as hours worked, start and finish dates of employment, location of work sites, rate of pay for particular workers, method of payment and/or amounts of total payment for work done, there is rarely any independent source to verify any specific data. The daily logs maintained by Kooner – the employer – are inadequate and are at odds with other records including his own computerized print-outs as prepared by his accountant. Joginder Singh Rai testified he had received nearly \$2,300 in cash but Kooner had denied – in speaking to Harby Rai – that he ever paid any worker in cash. No other appellant in the within appeals claimed to have received any cash payment. Meena Mann had medical appointments on the days set forth on Schedule B – attached to the Reply – but her hours of work - as submitted - included 67 hours for those missed days. In her testimony, she stated she had never worked on any day upon which she had a medical appointment. Joginder Singh Rai's evidence was that he started working for Kooner in January and the hours per week had increased until they were nearly full time in May and June. However, the starting date shown on his ROE is July 2, 1999. He also testified that he had notified HRDC of those hours

worked - beginning early in the year - by providing details on his regular report cards which he had to complete and return in order to obtain ongoing EI benefits. The respondent did not offer any evidence to counter this assertion.

[26] The Honourable Judge Miller, Tax Court of Canada, encountered similar difficulties hearing the case of *Khunkhun v. Canada (Minister of National Revenue – M.N.R.)*, [2002] T.C.J. No. 483. 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 *Khunkhun* 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. Commencing at paragraph 12 of his judgment, Judge Miller commented as follows:

12. Was Ms. Khunkhun employed as an orchard worker on Mr. Nagra's farm for 961.5 hours in 2000? The Respondent's position is no, she was not. According to the Respondent, the ROW for 2000 and four October cheques were nothing more than a sham to give the appearance that the Appellant worked. The ROW was inconsistent with the evidence Ms. Khunkhun was paid partially by piece work. Ms. Khunkhun was not being truthful in suggesting she was present at the farm team visits. The cheques were made out at the same time. There is no evidence that two of them were ever deposited. Ms. Khunkhun could not verify how many hours she worked, nor how many days she missed. These are all factors that work against her position of 961.5 hours of insurable employment.

13. Are there factors that support her position? Her somewhat evasive answers about time actually worked gave little support to the figure of 961.5 hours; however, they still suggested to me that she has worked as an orchard worker. The pay stubs for 2001 provided some evidence of that. They also support the breakdown between piece work and hourly wages, albeit for the 2001 year and not the 2000 year. Another factor in support of Ms. Khunkhun's position is that Canada Trust's confirmation of the two deposits clearly represented two of the October 2000 cheques. I am satisfied that workers might not be paid until the end of the season. This does appear to be common practice. Finally, Mr. and Mrs. Bains supported Ms. Khunkhun's position as an orchard worker in 2000, but provided no evidence as to her hours.

14. What I should take from Mr. Nagra's presence but failure to testify? Is there a negative inference contrary to Ms. Khunkhun's position to be drawn? This was not suggested by the Respondent. Was he there in some way to intimidate? Again, I cannot say, but I do find it curious. Presumably, he did not want to give evidence and certainly nobody wanted to force him to.

15. My overall impression of Ms. Khunkhun and Mr. and Mrs. Blains was that they exhibited a nervous, cautious almost fearful demeanour. This leads me to the conclusion that I have not heard the whole story of Mr. Nagra and his workers. I believe there are likely some liberties being taken with the truth of Ms. Khunkhun's employment. There is simply more going on than I can fully ascertain. I do not, however, believe that the whole thing is a sham as the Respondent would have me believe. Yes, there were inconsistencies; yes, testimony was at times vague; and yes, I believe Ms. Khunkhun lied about being present at the farm team visits. However, testimony was also supportive of Ms. Khunkhun's working and receiving some payment for that work. The truth I suggest lies somewhere between the sham suggested by the Respondent and the 961.5 hours suggested by the Appellant.

16. Having reached that conclusion, I am mindful of Judge Margeson's comments in *Narang v. M.N.R.* ([1997] T.C.J. No. 99) a case similar to this, where he stated:

Certainly if the Court should find that there was a "sham transaction" then there was no insurable employment, but the Respondent has no burden to establish that there was a "sham transaction".

The burden is on the Appellant and the Intervenors to establish on a balance of probabilities that there was work performed under a contract of service, that the workers worked the periods of time set out in the ROEs and that they were paid the amounts referred to therein.

I find that on the balance of probabilities, Ms. Khunkhun performed work under a contract of service for some period during 2000. However, I am not convinced that she worked the period of time set out in the ROE, nor that she was paid the full amount referred to therein. I do find that she received the payments of two of the October 2000 cheques totalling \$3,383.79. Based on the Respondent's assumptions of Mr. Nagra's deductions on Ms. Khunkhun's T\$ slip, this would represent a gross pay of

approximately \$4,380. At an hourly rate of \$10 this suggests 438 hours worked. While I recognize that this is a rough and ready approach to the problem, I am prepared to allow the appeal to this extent for the following reasons.

17. I am not satisfied that it is the worker who is wholly at fault here. As I have indicated, I suspect something is indeed rotten in the orchard business, though I am not sure exactly what, but to penalize the worker alone, the lowest spectrum of the fruit industry, does not seem just. My impression is that these seasonal workers, many who do not understand English, can be subjected to questionable labour tactics. Presumably, this is why these farm teams in British Columbia go to orchards, to in part educate the workers about their rights and responsibilities. The worker is wrg to fall into any trap for purported personal gain which involves deceiving the authorities. That is not tolerable. Neither is it acceptable that the most vulnerable bear an uneven burden and responsibility when deceit is uncovered. I believe Ms. Khunkhun worked for Mr. Nagra in 2000, but the hours reported by Mr. Nagra on the ROW are inaccurate. I am not prepared to reduce them to zero with the consequential adverse impact on Ms. Khunkhun. Neither am I prepared to allow Ms. Khunkhun's claim of having worked 9651.5 hours based on the evidence she presented. I allow the appeal and refer the matter back to the Minister on the basis that Ms. Khunkhun worked 438 hours of insurable employment in 2000.

[27] Counsel for the respondent – in the course of his submissions – outlined the positions taken by the Minister with respect to each appellant at various times - as reflected in the relevant Reply or a subsequent concession – and as ultimately supported by the evidence adduced in the within appeals.

[28] With respect to the appeal of Joginder Singh Rai, I cannot accept that there was additional remuneration paid in the form of cash since there is absolutely no other proof capable of supporting that proposition and the overall evidence is not consistent with that event taking place. In order for Rai's insurable hours to be increased, it would be necessary to accept that payment - for a considerable number of hours - had been made in cash. However, in the face of conflicting numbers throughout the various documents and the lack of independent proof on certain relevant matters integral to his appeal, the only rational method of dealing with his situation is to calculate the total amount paid to him - by cheques - and to divide that sum by the hourly wage rate in order to arrive at the number of hours worked. In the relevant Reply, the Minister conceded the number of insurable hours was 838 and that Rai's insurable earnings were in the sum of \$5,989.09. After reviewing the

evidence, I find the appellant – Rai – was unable to demonstrate this conclusion was incorrect.

[29] With regard to Meena Mann, the Minister accepted that she had earned the sum of \$5,291.51 which – at a minimum wage rate of \$7.15 per hour – resulted in 730 insurable hours. However, there were 67 hours claimed by her during days on which she testified she was obtaining medical advice or treatment and did not work. Accordingly, the proper number of insurable hours must take into account that amount of missing work time so as to result in a final number of 663.

[30] The appellant – Sohan Mann – testified he began working for Kooner in May, 1999 and had worked a total of 982 hours. His ROE indicated he started on July 3, 1999 and had earned a total of \$7,078.50 during the course of 990 hours employment. However, the total sum of the cancelled cheques was only \$3,295.25 which – when divided by the minimum wage of \$7.15 – results in 461 hours. Sohan Mann testified that he had requested additional payment from Kooner and estimated he had been owed the approximate sum of \$3,400 as of his layoff date on November 15, 1999. He had not made any complaint to any labour tribunal having competent jurisdiction and any arrears – even if owed – cannot be taken into account when calculating insurable earnings in accordance with the *Regulations*.

[31] The appellant – Gurdev Singh Chahal – claimed he had worked for Kooner for the period of October 31 to November 15, 1999, following the first period of employment which ended on October 30, 1999. With respect to the period following October 31, 1999, there is no evidence Chahal worked for Kooner except for his testimony that he had received a telephone call from Kooner to the effect there was work to be done in a greenhouse at Brent Kelly Farms. No other records or other proof supported his claim but he did receive a cheque dated November 15, 1999 – in the sum of \$498.80 – which he deposited on January 10, 2000, shortly after Kooner issued it to him. Chahal testified Kooner was always late with payment for work done but had offered the assurance that – sooner or later – he would pay up all the wage arrears. The Minister regarded said cheque as being attributable to the period of employment ending on October 30, 1999. Chahal maintained he was being paid only \$7.00 per hour instead of the minimum wage of \$7.15. I find the appellant – Chahal – has failed to adduce sufficient reliable evidence to support any finding of insurable employment during the so-called second period between October 31 and November 15, 1999. As a result, the decision of the Minister finding there was no insurable and/or pensionable employment during this time frame is correct and must be confirmed. As for the first period, Chahal was paid – by cheques – but the copies produced in evidence totalled the sum of \$6,285.34. The ROE had stated earnings

were \$8,204.63 with 1,147.5 insurable hours, a calculation based on a wage of \$7.15 per hour. However, the computerized print-out of Arun payroll records – Exhibit R-17 - indicate Chahal had been paid a total amount of \$7,596.88 for the period ending October 31, 1999. Chahal testified he thought he had misplaced one or two cancelled cheques and suspected the total amount of the cheques - reproduced in Exhibit R-13 - should have been greater. Having regard to the overall unreliability of various documents and the lack of additional proof concerning integral matters at issue, the only reasonable method for calculating insurable hours is to divide the proven earnings – in the sum of \$7,596.88 – by the minimum wage of \$7.15 - resulting in 1,062 hours. It is unfortunate that – during the course of his employment - Chahal was not able to obtain satisfactory explanations from Kooner concerning the variation in amounts of pay and/or hours and the numbers later used in the ROE but he is unable to read and write in English and Mrs. Kooner had completed his application form for EI benefits. He was unable to substantiate that he had worked a total of 1,147.50 hours - as stated in ROE - or any number of hours greater than that resulting from the exercise in the method referred to above.

[32] In conclusion, the following appeals are subject to the stated result:

Joginder Singh Rai:

The appeal is allowed and the decision of the Minister is varied to find the appellant was employed in insurable employment with Jaswinder Kooner - operating as Arun Contractors – for the period from January 3 to November 15, 1999 and his total insurable hours were 838 with insurable earnings in the sum of \$5,989.09.

Meena Mann:

The appeal is allowed and the decision of the Minister is varied to find the appellant was employed in insurable employment with Jaswinder Kooner – operating as Arun Contractors – for the period of August 5 to November 15, 1999 and her total insurable hours were 663 with insurable earnings in the sum of \$5,291.51.

Sohan Mann:

The appeal is dismissed and the decision of the Minister is confirmed.

Gurdev Singh Chahal:

The appeal – 2002-1317(EI) is allowed and the decision of the Minister is varied to find the appellant was employed in insurable employment with Jaswinder Kooner – operating as Arun Contractors – during the period of January 5 to October 30, 1999 and his insurable hours were 1,062 with insurable earnings in the sum of \$7,596.88. The part of the decision pertaining to the period of October 31 to November 15, 1999, wherein the Minister found the appellant was not in insurable employment with Kooner, is hereby confirmed.

[33] The appeal – 2002-1318(CPP) – is dismissed and the decision of the Minister is confirmed.

Signed at Sidney, British Columbia, this 21st day of February 2003.

"D.W. Rowe"

D.J.T.C.C.

CITATION: 2003TCC79

COURT FILE NO.: 2002-680(EI), 2002-1266(EI),
2002-1268(EI), 2002-1317(EI),
2002-1318(CPP)

STYLE OF CAUSE: Joginder Singh Rai, Meena Mann,
Sohan Mann, Gurdev Singh Chahal and
M.N.R.

PLACE OF HEARING Vancouver, British Columbia

DATE OF HEARING December 2 and 3, 2002

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

DATE OF JUDGMENT February 21, 2003

APPEARANCES:

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