EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act, R.S.B.C. 1996, c. 113

-by-

J.W. Mickey Enterprises Ltd.

("Mickey")

- of a Determination issued by -

The Director of Employment Standards

(the "Director")

ADJUDICATOR:	Kenneth Wm. Thornicroft
FILE No.:	98/57
DATE OF DECISION:	April 16th, 1998

DECISION

OVERVIEW

This is an appeal filed by James Mickey on behalf of J.W. Mickey Enterprises Ltd. ("Mickey" or the "employer") pursuant to section 112 of the *Employment Standards Act* (the *"Act"*) from a Determination issued by the Director of Employment Standards (the "Director") on January 8th, 1998 under number CDET 007343 (the "Determination").

The Director determined that Mickey owed its former employee, Jordan Borgford ("Borgford"), the sum of $1,698.98 on account of unpaid overtime wages.

ISSUES TO BE DECIDED

In a letter addressed to the Tribunal dated January 28th, 1998 and appended to its appeal form, Mickey submits that the Determination should be cancelled because:

> i) Borgford's complaint must be dealt with under federal, rather than provincial, employment standards legislation;
>
> ii) In any event, Borgford was a "manager" and accordingly not entitled to claim overtime under the *Act;* and
>
> iii) the Director's delegate failed to take into account the sum of $1,956 advanced to Borgford without the latter having performed any work.

FACTS

Mickey is a firm incorporated in Yukon Territory and is extra-provincially registered to conduct business in British Columbia. Since 1982 it has been engaged as a subcontractor for Canada Post Corporation. It carries out activities on behalf of Canada Post in both Yukon and British Columbia. Something in excess of 95% of Mickey's revenues are generated through subcontracting work for Canada Post and this situation has prevailed since 1983.

The principal shareholder of Mickey, whom I understand to be James Mickey, also controls at least two other British Columbia corporations, namely, Capital S Service Corporation and Dekra-Lite Industries Inc. ("Dekra-Lite"). According to the material submitted by the employer (and which has not been challenged by either the Director or Borgford), Capital S Service Corporation operates two "divisions"--an "Audio Lab" division which is an industrial audiometric testing facility and "Dekra-Lite" which is an exterior Christmas display lighting installer. Neither division is involved in carrying out subcontracting work for Canada Post and the business operations of the two divisions would appear to be entirely independent from Mickey.

The undisputed evidence before me is that Borgford was employed as a manager with Mickey situated in Yukon Territory. Apparently, Borgford wished to relocate to the B.C. lower mainland and thus an arrangement was worked out whereby Borgford would be transferred to the Coquitlam office of Dekra-Lite. This proposed transfer is more particularly described in a memorandum (referred to in the Determination) dated September 27th, 1996.

The September 27th one-page memorandum is reproduced below:

> "re: Jordan Borgford
>
> 27 Sept 96
>
> Terms and conditions of t*emporary reassignment.*
>
> For the periods from 22 October through 13 December 1996 and 3 January through 24 January 1997, a relocation to Coquitlam and a lateral duty change is proposed.
>
> *Employer continues as JWM,* salary continues as presently calculated; a significant increase in hours/week is expected and will be banked beyond 50/week and paid through the period 14 December 96 through 2 January 97 and following January 24 97.
>
> *JWM will undertake certain expenses:*
>
> air transportation to/from Vancouver for each of two segments
> credit for $450 for mandatory use to either return to Whitehorse or alternatively to move others to Vancouver in the initial period. (use it or lose it)
> provision of a vehicle for to/from work use during the two periods
>
> In recognition of the above employer-borne costs (not normally associated with the position in question), JB is expected to accept certain conditions:
>
> noncompensable accommodation in the Lower Mainland
> travel time is not booked time
> selected training "off the clock"
> the traditional work week has no application
>
> *This agreement embodies in spirit the intention of employer and employee to forge a longer-term relationship which will be enhanced by the permanent reallocation of duties following this temporary trial period,* therefore it is understood by both parties that there be substantial initial investment not normally associated with similar activities.
>
> Any arrangement not specifically addressed in this memo, will be dealt with in a fashion conducive to the agreement; the key word is "equitable"

(italics added)

Borgford's evidence, which is entirely consistent with the employer's position, is that he arrived in Coquitlam on October 21st and returned to Whitehorse on December 14th, 1996. Borgford's submission to the Tribunal, dated February 17th, 1998, states, at page 3: "I was away from my wife and two children during this time period, except for a brief 4 day visit, and not only had to support my household in Whitehorse, but also the one I was living in in Cloverdale."

As noted by the Director's delegate in the Determination, following the initial period in Coquitlam ending December 14th, Borgford decided that he did not wish to permanently relocate to the B.C. Lower Mainland and thus he did not proceed with the second phase of the relocation proposal. He thereafter returned to Whitehorse and remained on Mickey's payroll until his employment ended in the latter part of January 1997.

The Determination deals only with Borgford's claim for overtime wages allegedly earned while he was working in Coquitlam from October to December 1996.

ANALYSIS

In my view, the employer' assertion that the Director has no jurisdiction in this matter is well-founded. Accordingly, I need not address the other two grounds of appeal although I will observe that Borgford, while he was working in Coquitlam, does not appear to have been a "manager" as defined in the *Employment Standards Regulation.*

In my opinion, J.W. Mickey Enterprises Ltd. clearly falls under federal jurisdiction by reason of section 91(5) of the *Constitution Act, 1867* which gives the Parliament of Canada "exclusive legislative authority" over "all matters coming within...[the] Postal Service". If Borgford's employer had been Canada Post, rather than Mickey, there would be absolutely no doubt that Borgford's unpaid wage claim would fall under federal, rather than provincial, law. In my view, the fact that Borgford was employed by a Canada Post subcontractor (a firm that generated 95% or more of its total revenues from Canada Post) does not materially change the situation inasmuch as Mickey was, by reason of its status as a Canada Post subcontractor, carrying out a "governmental function" and therefore could be characterized as a federal "governmental actor"--see *McKinney v. University of Guelph* (1990) 76 D.L.R. (4th) 545 (S.C.C.).

The Director has endeavoured to avoid this constitutional roadblock by limiting the Determination to "only the period of time the Complainant was working in British Columbia". However, it is not *where* the employee worked, but rather *for whom* the employee worked that is of paramount importance. If the employer falls under federal jurisdiction then so too must that employer's employees--see *e.g., Bell Canada v. Quebec* (1988) 51 D.L.R. (4th) 161 (S.C.C.); *Alltrans Express Ltd. v. B.C.* (1988) 51 D.L.R. (4th) 253 (S.C.C.); *C.N.R. v. Courtois* (1988) 51 D.L.R. (4th) 271 (S.C.C.); *Ontario Hydro v. O.L.R.B.* (1993) 107 D.L.R. (4th) 457 (S.C.C.).

As the italicized portions of the September 27th agreement, reproduced above, make clear, Borgford continued, even while on temporary assignment in Coquitlam, to be an employee of J.W. Mickey Enterprises Ltd. Not only was this state of affairs expressly agreed between the parties, but I also note that while Borgford worked in Coquitlam he remained under the supervision and control of Mickey, he continued to be carried on Mickey's payroll and was paid by way of payroll cheques drawn on Mickey's payroll account.

The Director's delegate, in a memorandum addressed to the Tribunal dated February 11th, 1998, submits that "Employees who work for Dekra-Lite are under provincial jurisdiction. The Complainant, while employed in British Columbia, worked for Dekra-Lite."

I entirely agree that the employees of Dekra-Lite Industries Inc. fall under provincial jurisdiction. However, the weight of the evidence before me suggests that Borgford was, at all times, an employee of J.W. Mickey Enterprises Ltd. While he did, for a brief period, work in the Dekra-Lite office situated in Coquitlam, he did so as a Mickey employee. Although it was anticipated that Borgford's employment relationship with Mickey might, at some future point, be severed and a new employment relationship established with Dekra-Lite, that latter event never occurred--this is evidenced by, among other things, the clear wording of the temporary reassignment agreement, Mickey's payroll records, the absence of a Record of Employment being issued to Borgford by Mickey in October 1996 (or by Dekra-Lite in December 1996) and Borgford's own written submissions to the Tribunal.

Further, even if it could be said that Borgford was a Dekra-Lite employee during the period October to December 1996, then the Director should have issued a Determination against Dekra-Lite, rather than against Mickey. If Borgford was, in fact and in law, a Dekra-Lite employee during the period in question, a Determination could only be issued against Mickey if Mickey and Dekra-Lite were also determined to be "associated corporations" under section 95 of the *Act*--a determination that was not made in this case.

ORDER

Pursuant to section 115 of the *Act*, I order that Determination No. CDET 007343 be cancelled.

_____

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal