

**EMPLOYMENT STANDARDS TRIBUNAL**

In the matter of an appeal pursuant to Section 112 of the  
*Employment Standards Act R.S.B.C. 1995, C.38*

- by -

Royal Victoria Security (1996) Ltd  
("RVS")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** John M. Orr

**FILE No:** 98/099

**DATE OF HEARING:** April 24, 1998

**DATE OF DECISION:** May 11, 1998

**DECISION**

**APPEARANCES:**

Arvind Singh	President, Royal Victoria Security Ltd.
George Roper	For Himself
Gerry Omstead	For The Director

**OVERVIEW**

This is an appeal by Royal Victoria Security Ltd ("RVS") pursuant to Section 112 of the Employment Standards Act (the "*Act*") from a Determination (File No. 055059) dated January 26, 1998 by the Director of Employment Standards (the "Director").

The Determination found that George Roper ("Roper") was employed by "RVS" as a security officer during a period that included from July 31, 1995 to March 15, 1997. During that time Roper worked hours that exceeded the minimum for the application of the overtime provisions of the *Act*. The Determination found that RVS owed Roper \$4122.02 (including interest).

RVS has appealed on the basis that Roper was a senior supervisor and although he did work longer hours he fell within the definition of "manager" and was therefore excluded from the provisions of Part 4 of the *Act*. A second ground of appeal is that the extra hours were scheduled at the request of and as a favour to Roper and that there was an agreement that all such extra hours were to be paid at "straight time".

**ISSUE TO BE DECIDED**

The issues to be decided in this case are firstly whether Roper was a "manager" as defined by the *Act* and the *Regulations* and secondly whether there was an agreement that all extra work would be at "straight time" and whether such an agreement is effective.

**FACTS**

There was no dispute that Roper worked for RVS as found by the Director's Delegate but Arvind Singh ("Singh") called witnesses on behalf of RVS to show that Roper was known as a supervisor by other employees. Singh testified that Roper was hired as a supervisor and that he gave Roper many extra hours at Roper's request. He says that Roper's duties were as a "mobile supervisor".

The security work was structured such that there were two divisions. The "Static Section" referred to those employees who worked at a particular job site which was being protected by RVS. The "Mobile Section" referred to employees who travelled around the city checking on a number of

sites. The checks would include locking up and opening certain buildings and would also include checking on buildings or sites several times each during the shift. The mobile security officer would have keys for all the various premises and would also be expected "if time permitted" to check in on all the "static" sites to make sure that the static security officers were on the job, in uniform, awake and alert. The mobile officers would also respond to all alarms and respond to calls for assistance from any of the static site officers.

Singh produced to me as evidence a company brochure which shows a picture of one of the vehicles used by the mobile officers and which shows the vehicle to be clearly marked "SUPERVISOR". The brochure says that:

"Our supervisors conduct frequent inspections of each employee and all findings are submitted to our office. This ensures that you receive the best services and overall protection available to you or your organization."

Singh also produced a log book bearing the title "Night Supervisor". The Log is an ongoing record of comments about the activities carried out by the mobile officers while on shift. The log was submitted to Mr Mohamed Sadek ("Sadek") who was the general manager of the business during the time that Roper was employed by RVS. Sadek would make comments and give directions to the mobile officers through the log book. It is clear from reading the log book that Sadek's primary duties consisted of supervising and directing other employees. It is also clear that Sadek sent directions to other employees through the mobile supervisors by means of the log book.

Mr Mohamed Sadek, a witness called by RVS, testified that the mobile supervisors would have about 10 buildings to check up to 3 or 4 times each per night. Sadek would give the mobile person a list of all these sites and it was up to the officer to organise his time accordingly. The mobile supervisor would also respond to all alarms and then if there was time visit some or all of the static sites to check on the employees there. He said that all mobile operators did the same job.

Sadek testified that Roper had no power to hire or fire staff but he could make a report which would be dealt with by Sadek or Singh. He said that the mobile supervisors did have authority to call an employee in to work if, for example, an scheduled employee failed to show up for a shift. However, all major decisions including hours of work and overtime came to Sadek or Singh for final decision.

Mr Eleia Kayal, a witness called by RVS, testified that he was one of the static site security officers. He testified that Roper "didn't deal with me too much" but that he believed that Roper made up the schedules. He believed that Roper was known as a supervisor.

Mr Janusz Miskiewicz, a witness called by RVS, testified that he started as a static security guard then moved to mobile and then to bike patrol. He was hired by Sadek and Singh. He said the Roper introduced himself as the night supervisor. He described one incident where two employees showed up for the same shift and that Roper was the one who decided who should go home. He agreed that Roper could not hire or fire or discipline.

Mr Singh testified that he hired Roper as a normal guard then promoted him to the mobile work. He says that an employee called Harold Peacock was the supervisor doing the schedules and that Peacock assigned Roper as his assistant in early 1996. Peacock left the firm shortly thereafter and

Roper was appointed senior supervisor. His work included the maintenance of the cars, checking on static staff and making site inspections. He says that Roper also worked on the schedules. Singh coached him and helped him do them. Schedules were ultimately approved by Sadek or Singh.

Singh testified that Roper wanted as many hours as he could get for financial reasons but he says that he told Roper that any additional hours would be at "straight time" because the company could have other workers on shift at straight time. He told Roper the company would not pay overtime. He says that Roper agreed to this proposal. Roper denied the arrangement saying that he and other employees had asked on several occasions about their overtime pay and the issue was always deferred.

Singh testified that, during an eight hour shift, Roper would spent about two hours checking on other employees. Roper said however that the time spent checking on other employees at the static sites was more like thirty to forty five minutes. He testified that his job primarily consisted of opening and closing buildings, frequent mobile checks on buildings that did not have guards on site, and checking on alarm calls. He says that the "run sheet", i.e. the list of buildings he had to check, would usually consist of about 10 buildings requiring 30 to 40 site checks per shift. He says that the static site checks were the last priority and were done when, and if, there was time.

## ANALYSIS

The relevant provisions of the *Act* are as follows:

4. *The requirements of this Act or the regulations are minimum requirements, and an agreement to waive any of those requirements is of no effect, subject to sections 43, 49, 61 and 69 (provisions relating to collective agreements).*

The relevant provisions of the *Regulations* are as follows:

### ***Definitions***

1. (1) *In this regulation:*

*"manager" means*

- (a) *a person whose primary employment duties consist of supervising and directing other employees, or*
- (b) *a person employed in an executive capacity;*

### ***Exclusions from Parts of the Act and this regulation***

34. (1) *Part 4 of the Act does not apply to any of the following:*

- (f) *a manager;*

The appellant, RVS, raises two grounds for appeal. The first is that Roper was a supervisor and therefore fell within the definition of "manager" under the *Regulations*. RVS contends that because

Roper was a manager the provisions of Part 4 of the *Act (the hours of work and overtime provisions)* do not apply.

It is not suggested that Roper was employed in an executive capacity and therefore the issue to be decided is whether Roper's primary employment duties consisted of supervising and directing other employees. This point was submitted to the Director's Delegate prior to his Determination but the Delegate was not persuaded that Roper was a supervisor.

I am persuaded that Roper had supervisory duties and that his job description included the title of "night supervisor". I accept that many employees thought of him as a supervisor. It is submitted and agreed by Roper that part of his duties were to check on other employees. These checks included a supervisory duty to ensure that other employees were on site, properly attired and on task. Roper could report employees to management who would take the necessary disciplinary action. The log book confirms the supervisory nature of these checks. Roper also was involved during some periods of his employment in making up the schedule which was approved and authorised by management.

The title given to a position is not relevant in determining whether the employee is a manager for the purposes of the *Employment Standards Act*. It is the specific employment duties of the position that must be looked at. *Sambuca Restaurant Ltd* (1997) BC EST #D322/97. I would also add that the perception of other employees about the status of the particular position is not relevant unless consistent with the actual duties performed.

It was agreed by RVS that Roper did not have the authority to hire, fire, or discipline other employees. He could report them to management and it was part of his duties to do so if necessary but he could not make the decisions himself. There was no evidence that Roper actually directed any of the other security officers in the performance of their duties other than the authority to report.

There is no doubt in my mind, and all of the evidence confirms, that Roper's primary duties were as a security officer. Eighty to ninety percent of his time was spent on mobile security patrol opening and closing buildings, responding to alarms, and doing frequent routine checks of buildings which did not have on site guards. Even accepting the evidence of Singh, patrol work took up no less than 75% of Roper's activities. There is also no doubt that some of Roper's time was spent supervising the "static" sites and checking the on site guards. However, his primary employment duties did not consist of supervising or directing other employees.

I conclude that, although Roper did perform supervisory duties, his primary employment duties did not consist of supervising and directing other employees. I conclude that he was not a "manager" and therefore Part 4 of the *Act* does apply and he is entitled to overtime pay.

The second ground of appeal was that there was a specific agreement between Singh and Roper that Roper would be given extra hours at work to help him out financially but that such hours would be paid at "straight time" without any overtime pay. I am not persuaded, on the evidence before me, that such an agreement was mutually arrived at. Certainly, Singh took the position that the company would not pay overtime and may have stated this on occasion to Roper and other employees but this unilateral policy does not constitute an agreement even if the employee works extra hours knowing the company policy.

In any event, the *Act* is very clear that its requirements are minimum and that any agreement to waive any of the requirements is of no effect. Given that an agreement is of no effect then certainly company policy could not be effective in eliminating the requirements to pay overtime.

**ORDER**

I order, under Section 115 of the *Act*, that the Determination is confirmed.

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**JOHN M. ORR  
ADJUDICATOR  
EMPLOYMENT STANDARDS TRIBUNAL**