

An appeal

- by -

GP Battery Marketing (B.C.) Inc. and
GP Battery Specialist Inc. (Associated Corporations)
("GP" or "Employer")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: Paul E. Love

FILE No.: 2001/609

DATE OF HEARING: November 8, 2001

DATE OF DECISION: November 14, 2001

DECISION

APPEARANCES:

Frances Leung, for GP Battery Marketing (B.C.) Ltd.

Shu Fan Poon also known as Elizabeth Poon

OVERVIEW

This is an appeal by an employer, GP Battery Marketing (B.C.) Inc. And GP Battery Specialist Inc. (“GP” or “Employer”), from a Determination dated August 8, 2001 issued by a Delegate of the Director of Employment Standards (“*Delegate*”) pursuant to the *Employment Standards Act, R.S.B.C. 1996, c. 113* (the “*Act*”). The Delegate determined that Shu Fan Poon was entitled to wages in the amount of \$2,329.70, as the employer had required Ms. Poon to work through her meal breaks. The uncontradicted evidence of the Employee was that she usually worked alone when working in the three “shopping mall” locations of the Employer’s business. She served customers during her meal break. When she left the location to purchase food, she would post a sign, made by the employer and placed into a plexi-glass holder supplied by the Employer, indicating “Back in 5 minutes”. The Employer did not contradict the Employee’s evidence, and the Employer’s witness did not have any discussions with Ms. Poon as to how she would take her meal break. In the circumstances of this case it is apparent that the Employer required Ms. Poon to work during her meal break. I therefore confirmed the Determination.

ISSUE:

Did the Delegate err in finding that the Employer required Ms. Poon to work during her lunch break?

ARGUMENTS OF THE PARTIES:

The Employer argued that it did not require Ms. Poon to work during her lunch break, and that the Delegate erred in finding that Ms. Poon was entitled to be paid wages for the meal break. Ms. Poon argued that she was required to work during her meal break, and she is entitled to be paid wages for working during her meal break.

FACTS

I decided this case after an oral hearing. There is no substantial dispute concerning the essential facts. In this appeal I heard from Francis Leung, a director and manager with the Employer. I also heard from Keith Wong, the Employer’s certified general accountant. While Mr. Wong, had

helpful information to give about the formation of the Employer, he could not assist me on the major issue in this case. I also heard from Ms. Poon.

G.P. Battery Marketing (B.C.) Inc. and G.P Battery Specialist Inc. are the whole sale and retail branches of the Employer, who is involved in the sale of batteries. These companies are related to a parent company in Hong Kong.

Shu Fan Poon, also known as Elizabeth Poon, worked for the employer at three different retail locations. The Employer is in the business of selling batteries, and cell phones at locations in shopping malls. Ms. Poon worked at Lansdowne, Metrotown and Park Royal Malls, all located in the Lower Mainland. She commenced her employment when she was 18 years old., and worked for the Employer between July 17 1997 to June 12, 2000. She was paid \$7.15 per hour when she started working, this rate was increased to \$9.00 and then \$11.00 per hour.

Ms Poon kept track of her hours on a time sheet, and then faxed the time sheet to the Lansdowne Mall location. I am satisfied that the time sheets included in the materials filed with the Tribunal truly and accurately set out the time worked by Ms. Poon.

The primary issue in this case raised by the Employer is whether Ms. Poon should be paid for her meal break. The Employer says that the Employee was free to take a meal break, and was not instructed by the Employer to work during the meal break. The major issue of fact in this case was whether Ms. Poon was required by the Employer to work through her meal break. The facts are that the Employee was always at the Employer's store, and when the Employee left to obtain a meal, the Employee would post a sign prepared by the Employer which indicated that the Employee would be "Back in 5 minutes". The sign was a sheet of paper, prepared by the Employer, which the Employee was instructed to place into a plexi-glass stand (supplied b the Employer). The Employee ate her meal at her work station, and would interrupt her meal break to serve the customers. Most of the time she worked alone and was unsupervised by anyone. The Metrotown location, where Ms. Poon usually worked, was a kiosk in the middle of a corridor of the mall.

Ms. Poon was cross-examined by the Employer as to the reasons why she did not present her claim until after her employment ceased. Ms. Poon indicated that this was the first job that she had. She indicated that she started working at age 18 and was unfamiliar with the labour laws of British Columbia. She was a commerce student at university and she did not become aware of lunch break requirement under the *Act* until she found out about it through a commerce course. She indicated that everyone in the company was paid the same way.

The only witness tendered by the Employer which gave evidence bearing on this issue was Francis Leung. Mr. Leung, while he worked initially in starting the Vancouver locations. He then left the company. He came back to the company and became a director of the Employer in April of 2000. While Mr. Leung did hire Ms. Poon in 1998, his opportunity to observe the employment situation of Ms. Poon was for the period of April to June 12, 2000. Mr. Leung's evidence essentially was that the company " never requested the employees to work during their

lunch break”. Mr. Leung admitted that he had never had discussions with Ms. Poon about how she could take breaks.

Ms. Poon indicated that the Employer operated in shopping mall locations, and that the shopping malls expected all vendors to be open during regular mall hours. Ms. Poon is now a business owner, and has signed contracts with shopping malls, and she indicates that shopping malls usually require someone to be present and keep the store open at all times during mall operating hours.

In this appeal the Employer did not challenge the calculations made by the Delegate that Ms. Poon was entitled to \$2,068.81, plus 4 % vacation pay, plus \$178.14 interest, for a total of \$2,329.70. The Delegate also ordered the Employer to cease contravening sections 32, 34, 40 and 44 of the *Act*.

ANALYSIS

In an appeal under the *Act*, the burden rests with the appellant, in this case the Employer, to show that there was an error in the Determination such that I should vary or cancel the Determination.

In my view, the Employer’s witnesses had no helpful information to give which contradicted the credible evidence given by Ms. Poon. I have no hesitation in accepting Ms. Poon’s evidence that she worked during her meal break. I have no hesitation in concluding that the Employer supplied a sign which the Employee was to post, indicating that the Employee would be back in 5 minutes. The Employer did not direct Ms. Poon to take her lunch break. Given the absence of the Employer’s instructions concerning breaks, the supply of a sign which indicates “back in 5 minutes”, and the evidence of Ms. Poon that she served customers during her lunch break, I have no hesitation in concurring with the Delegate that the Employer required Ms. Poon to work during her lunch break.

The applicable section of the *Act* is Section 32 :

32. (1) An employer must ensure

(a) that no employee works more than 5 consecutive hours without a meal break, and

(b) that each meal break lasts at least a ½ hour.

(2) An employer who requires an employee to be available for work during a meal break must count the meal break as time worked by the employee

Here it is clear that the Employer required Ms. Poon to work through her lunch break. The Employer took no steps to instruct Ms. Poon not to work during her lunch break, to supply a relief worker, or to close the shop for a period of time so that she could take her lunch break.

Statutory Holiday Pay Claim:

The Delegate did not make any finding that Ms. Poon was entitled to statutory holiday pay.

In her written submissions prior to the appeal, dated September 15, 2001, Ms. Poon also claimed the sum of \$991.60 for statutory holiday pay. In a written response to Ms. Poon's submission, dated November 2, 2001, the Delegate submitted that Ms. Poon was not entitled to statutory holiday pay because her complaint did not include a claim for statutory holiday pay. I have reviewed the complaint form filed on June 13, 2001, following the cessation of her employment. In that complaint she raises claims for overtime and for "mileage". I find that Ms. Poon's claim for statutory holiday pay was not made within 6 months of the date that she ceased employment, and therefore the claim is barred pursuant to s. 74(3) of the *Act*.

ORDER

Pursuant to s. 115 of the *Act* I order that the Determination dated August 8, 2001 is confirmed.

Paul E. Love
Adjudicator
Employment Standards Tribunal