

An appeal

- by -

Bloomberg Bio-Technology Development Ltd.
carrying on business as Pioneer Sprouts
("Bloomberg")

- 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 (as amended)

TRIBUNAL MEMBER: Shafik Bhalloo

FILE No.: 2007A/20

DATE OF DECISION: May 15, 2007

DECISION

SUBMISSIONS

Donald S. Boyle on behalf of Bloomberg Bio-Technology Development Ltd.
Ted Mitchell on behalf of the Director of Employment Standards
Swee Har Ng on her own behalf

OVERVIEW

1. This is an appeal by Bloomberg Bio-Technology Development Ltd. carrying on business as Pioneer Sprouts (“Bloomberg”) under Section 112 of the *Employment Standards Act* (the “Act”) against a Determination of the Director of Employment Standards (the “Director”) issued January 29, 2007.
2. The Determination found that Bloomberg had contravened Part 3, S. 18; Part 7, S. 58; and Part 8, S. 63 of the Act in respect of the employment of Swee Har Ng (“Ng”) and ordered Bloomberg to pay Ng \$5,644.56, an amount which included wages and accrued interest pursuant to S. 88 of the Act.
3. The Determination also imposed administrative penalties on Bloomberg under S. 29(1) of the *Employment Standards Regulation* (the “Regulation”) in the amount of \$500.00 for each of the contraventions for a total of \$1,500.00.
4. The total amount of the Determination, inclusive of the administrative penalties, is \$7,144.56.
5. Bloomberg, in its Appeal Form, appeals the Determination on two grounds, namely, the Director of Employment Standards erred in law in making the Determination and new evidence has become available that was not available at the time the Determination was being made. However, in its written submissions attached to the Appeal Form, Bloomberg only advances the latter ground of appeal and tenders, in support of that ground, the evidence of two employees, namely, Lily Chan (“Chan”) and Jing Gao (“Gao”) in the form of Statutory Declarations as well as a letter from Bloomberg’s former counsel, Winston Wu, who represented Bloomberg at the hearing on October 4 and 16, 2006 (the “Hearing”) conducted by the delegate of the Director (the “Delegate”). Bloomberg wishes to adduce the Statutory Declarations of Chan and Gao as new evidence in the Appeal and as third person, first hand account of the material discussion between Ng and Zhang on April 3, 2006, as well as the circumstances surrounding Ng’s last day of work on April 5, 2006. It is Bloomberg’s contention that the evidence of Gao and Chan, “if believed, should lead the Delegate to a different conclusion”.
6. In the appeal submissions, Bloomberg has requested an outright cancellation of the Determination.
7. Bloomberg has not requested an oral hearing of the Appeal. Section 36 of the *Administrative Tribunals Act* (which is incorporated in the *Employment Standards Act* (s. 103)), and Rule 16 of the Tribunal’s rules of Practice and Procedure provide that the Tribunal may hold any combination of written, electronic and oral hearings. In my opinion, this appeal can be adjudicated on the written submissions of the parties without resort to an oral hearing. Accordingly, I have decided the Appeal on the S. 112 (5) “record”, the submissions of the parties, and the Reasons for the Determination.

ISSUE TO BE DECIDED

8. The issue in this appeal is whether there is new and relevant evidence that was not available at the time the Determination was being made that would have lead the Delegate to a different conclusion on a material issue and would warrant this Tribunal to vary or cancel the Determination.

FACTS AND ARGUMENT

9. Ng filed a complaint under S. 74 of the Act (the “Complaint”) alleging that Bloomberg contravened the Act by failing to pay her regular wages, annual vacation pay and compensation for length of service.
10. The Hearing of the Complaint, as previously indicated, was held on October 4 and 16, 2006.
11. At the Hearing, Ng attended on her own behalf and also brought her husband, Andrew Chye (“Chye”). Attending on behalf of Bloomberg at the Hearing were Li Dong Cui (“Cui”) and Li Hua Zhang (“Zhang”), owners, directors and officers of Bloomberg.
12. Bloomberg was also represented at the Hearing by legal counsel, Mr. Winston W. Wu.
13. At the Hearing, there were several issues in dispute including whether or not Ng was an employee or an independent contractor of Bloomberg. However, on appeal, the main issue is whether or not Ng quit or was her employment terminated by Bloomberg. It is in relation to that issue and Ng’s related claim for severance pay that Bloomberg has sought to adduce new evidence.
14. In the Determination, the Delegate concludes:

“On a balance I am not persuaded that Ng quit her employment. Rather, I am of the view that Zhang terminated Ng’s employment pursuant to the conversation between them which I accept took place at the work site on April 3, 2006.”
15. The Delegate, in support of his conclusion or findings, accepted the evidence of Ng’s husband, Chye, which was in the form of a letter tendered in evidence at the Hearing.
16. The Delegate recounted the conflicting evidence between Zhang and Ng on pages 5 and 6 of the Determination as follows:
 - (a) “Zhang stated that following Ng’s return to work from vacation on April 3, 2006, as Chye was close to retiring, she asked Ng about her intentions concerning retirement. Zhang claims Ng informed her she would work only for another month;
 - (b) For Ng’s part, she said Zhang informed her on April 3, 2006, that her services were no longer required;
 - (c) Zhang disputes Ng’s claim that she asked Zhang on April 3, 2006, to provide her with a final pay cheque and issue her an ROE;
 - (d) In support of her claim that she was terminated by Zhang, Ng submitted into evidence a letter from Chye dated September 10, 2006. In his letter Chye stated, in part, as follows:

“I...was [at the work site] on April 03/2006 at 11:00 a.m. The owner Mrs. Zhang Li Hua told Mrs. Swee Har Ng that she do not have to come in any more verbally. Since I am her husband, I feel the need to speak the truth because at Mediation, she says that Mrs. Swee Har Ng quit, which is not true. There are a few employees there at the time too, but I think that while working for Mrs. Zhang Liu Hua might find themselves out of a job.”

- (e) In support of Bloomberg’s position that Ng’s intentions were to retire, Wu called upon Peter Fu (“Fu”), of Peter Fu Multiple Realty Ltd. to give evidence. Fu stated his understanding that Ng’s intentions were to retire in view of her husband Chye’s retirement. Fu noted that prior to Bloomberg’s purchase of the business from Moriah, sale of the business to another potential buyer fell through as a result of Ng’s intention to retire and her reluctance to commit to long term employment after the sale of the business by Moriah.”

17. At page 9 of the Reasons for the Determination, the Delegate states:

“In spite of Chye’s close personal relationship with Ng, Chye’s statement dated September 10, 2006, provides the only third person, first hand account of the critical conversation between Zhang and Ng at the work site on April 3, 2006. Furthermore, Chye was not subjected to a vigorous challenge during cross-examination on this particular evidence by Wu. While other employees were said to be near by at the time of the subject conversation, beyond Chye’s statement neither party presented witness evidence pertinent to the gist of what was actually spoken between Zhang and Ng. Neither was there a letter of resignation or a letter of termination presented in evidence.

18. The Delegate also notes that, at the Hearing, there was a copy of a letter to Bloomberg from WorkSafe BC (“WorkSafe”) dated April 6, 2006 wherein WorkSafe advised Bloomberg of a Form 7 (the “Form”) to be completed and forwarded by Bloomberg to WorkSafe BC. The letter containing the Form was sent by WorkSafe to Bloomberg after Ng’s attendance to a physician following an injury to her right shoulder, which was reportedly sustained at work on April 4, 2006.

19. The Delegate also notes at page 9 that with respect to Ng’s shoulder injury at work on April 4, 2006, Bloomberg took the position that following this injury Ng quit simply by not returning to work after April 5, 2006. However, Ng, on her part, maintained that Zhang terminated her employment and she did not present her injury as a critical event in the cessation of her employment. Ng asserted that her return to work on April 4 and 5, 2006, after Zhang terminated her employment on April 3, 2006, was for the sole purpose of taking delivery of her final pay cheque and the ROE. Ng also stated that her resumption of work responsibilities during these two days at the work site was a function of sheer habit.

20. The Delegate also notes that Bloomberg issued two Records of Employment (“ROE”) in relation to the termination of Ng’s employment. In the first ROE, which was undated and unsigned, Bloomberg noted “shortage of work” as the reason for its issuance. In the second ROE, the Delegate notes that Bloomberg marked Code “E” for the reason for its issuance that represents that the employee “quit”. This, according to the Delegate, is inconsistent with the notation in the second ROE of “severance pay” in the amount of \$653.10 paid to Ng.

21. According to the Delegate, if Ng quit (as Bloomberg claims) then Bloomberg had no obligation to pay severance. Thus the inconsistency in the second ROE.

22. Bloomberg submits the Statutory Declarations of Chan and Gao, containing the new evidence, constitute “ a third person, first hand account of the conversation of April 3, 2006 (between Zhang and Ng) as well as April 5, 2006, being (Ng’s) last day of work”.

23. Bloomberg states that Gao's evidence was not tendered "in the first instance because she was in China from April 25, 2006 to December 2006, and was therefore unavailable for interview or to attend the (H)earing on October 4, 2006".
24. In the case of Chan, Bloomberg indicates that it did not tender her evidence due to "misapprehension of her evidence" by their then counsel, Wu. Bloomberg attaches a letter from Wu dated March 8, 2007 (the "Letter") in support of this assertion.
25. In the Letter, Wu states that he "inquired of Lily Chan, an employee of Bloomberg, as to whether she 'participated' in a conversation with Mrs. Zhang and Irene Ng on April 3, 2006, and that she advised that she had not". Wu then goes on to state in the Letter that he "concluded from Lily Chan's comments that she had not overheard the entire conversation between Mrs. Zhang and Irene Ng" and accordingly, "did not inquire of Lily Chan as to whether she had overheard the entire conversation between Mrs. Zhang and Irene Ng". Bloomberg states that because of Chan's response that she did not participate in the conversation between Zhang and Ng, Wu reasonably concluded that Chan's answer also meant that she did not overhear the conversation.
26. With respect to the Statutory Declarations of Chan and Gao, Bloomberg states that while Chan and Gao were in separate rooms at the time of the conversation between Zhang and Ng on April 3, 2006, the work premises of Bloomberg are small enough and the rooms are situated in such a manner that they could both overhear the conversation.
27. Chan, in her Statutory Declaration, states that on April 3, 2006, she was present around the lunch table at the time Zhang, Ng and Chye were present. She further states that:
- (a) Mrs. Zhang mentioned to Irene Ng that before Irene Ng and her husband had gone on vacation, her husband had told her that he wanted to retire after they came back from vacation;
 - (b) Mrs. Zhang asked Irene Ng whether she was going to retire;
 - (c) Irene Ng told Mrs. Zhang that she would work to the end of April and would then retire; and
 - (d) Mrs. Zhang said that that was alright with her."
28. Chan also mentions in her Statutory Declaration that two days later, on or about April 5, 2006, that she and Ng were working on either side of the packing table and Zhang was working at the end of the table when Ng gestured with her hands for Zhang to come and talk to her by the order desk, which is about ten feet away from the packing table. Zhang then followed Ng to the other desk and they had conversation that Chan did not hear but Ng then came over to the packing table and stated "I don't want to work here anymore" and then packed her things and left. This was Ng's last day of work, according to Chan.
29. With respect to Gao's Statutory Declaration, Bloomberg asserts that while Gao was not in the lunchroom at the time of the April 3, 2006 conversation between Zhang and Ng, she was working about ten feet away from where the conversation took place and her Statutory Declaration corroborates the evidence of Zhang and Chan and contradicts the evidence of Ng.
30. Gao states in her Statutory Declaration that she left for China on April 25, 2006 and did not return to Canada until December 2006.

31. Gao further states that on or about April 3, 2006 when she was washing sprouts in the late morning, she overheard a conversation between Ng and Zhang while they were standing near the office table, which is at the entrance to the area where employees often eat their lunch. She indicates that the office table is about ten feet from where she was working at the time. Her “best recollection of the conversation between Irene Ng and Mrs. Zhang” is that:

“(a) Mrs. Zhang said to Irene, your husband tells me that he is retiring and that you are tired and don’t want to continue to work; and

(b) Irene Ng then said to Mrs. Zhang that she only wants to work until the end of the month.”

32. Gao also indicates in her Statutory Declaration that two days later, on or about April 5, 2006, when she was working near the packing table where Zhang, Ng and Chan were working, she noticed that Ng and Zhang were having a conversation near the order desk. After their conversation, Ng went over to the packing table and she said to Zhang “I don’t want to work here anymore” and then packed her things and left.

33. Bloomberg states that both Gao and Chan’s evidence is compelling and is to be preferred over the evidence of Ng and Chye because it is consistent with:

(a) the evidence of Zhang;

(b) the evidence of Fu, who testified that it was Ng’s stated intention to retire;

(c) Ng attending work for two days (on April 4 and 5, 2006) after she was allegedly terminated on April 3, 2006.

34. With respect to the last point, Bloomberg further notes, “it is simply not plausible that a terminated employee would return to work for two days after she was dismissed”.

35. Finally, Bloomberg argues that the new evidence of Chan and Gao meets the four part test for new evidence as set out in *Re: K.D.K.* [2005] B.C.E.S.T.D. No. 114.

36. The Respondent, Ng, submitted three Statutory Declarations (including her own) in response to the Appeal. The other two Statutory Declarations were of employees of Bloomberg, namely, her husband Chye and an employee named Yun Shong Shim (“Shim”). A letter from Shim was previously submitted by Ng at the Hearing and the Delegate found it of “no value” because it did not speak to his having personally heard any conversation between Zhang and Ng.

37. In her Statutory Declaration, Ng states that there were only three employees present on April 3, 2006 when Zhang approached her and informed her that her services were no longer required and that she should not come to work anymore.

38. Ng also points out in her Statutory Declaration that she informed Zhang that Zhang would have to pay her a month’s salary according to labour laws and that she would stay until the end of the month, in case Zhang wanted more information pertaining to the sprouts business.

39. Ng also stated in her Statutory Declaration that the only individuals present in the lunchroom on April 3, 2006 were Chan and two other employees named Mary and Eva who no longer work for Bloomberg. Ng

further states that Gao was not present “at the premises during the time when the conversation took place” between her and Zhang and therefore Gao was not a witness to the conversation.

40. Shim, in his Statutory Declaration, states that on April 3, 2006 between the hours of “0600 until 1200 hrs” the only employees that were present were Ng, Chye, Chan, Mary, Eva, Lum and Zhang but not Gao. He also indicates that he “started work from 0600 – 1200 on April 03/2006”.

41. Chye, in his Statutory Declaration, simply reiterates the evidence that he provided in his letter that was entered in evidence at the Hearing. He further states that in the lunchroom there were only three other employees present during Zhang’s and Ng’s conversation, namely, Chan, Mary and Eva. He indicates that Shim was at the back of the building cleaning up. He also states that Gao was not on the premises and that can be confirmed by Chan, Mary, Eva and Shim.

42. The Director, in his submissions, on the subject of new evidence, points to the Notice of Complaint Hearing (the “Notice”) mailed to both parties on August 18, 2006 which contains, under the heading “Production of Records” the following provision:

“It is the responsibility of both the Employer and the Complainant to ensure that any records or evidence they intend to produce and/or rely on at the Hearing have been submitted to the Branch at least 14 days prior to the Hearing. These records must be exchanged with the other party, which will be done by the Branch, allowing enough time for all parties to review prior to the hearing.”

43. The Director also points out that a covering letter accompanied the Notice and the first page of that covering letter stated: **“IMPORTANT INFORMATION – PLEASE READ”**.

44. The Director also refers to the first page of the cover letter containing the heading **“INFORMATION AND DOCUMENTS REQUIRED”**. Under the said heading, the Director points out that it reads, in part:

“Please provide two copies of all documents that you will be relying on to support your position in the hearing. **Your documents must be received at our office by 4:00 p.m., September 14, 2006.**”

45. It is not clear the reason why the Delegate is making reference to the passages in the Notice or the cover letter accompanying the Notice except perhaps to suggest that the Statutory Declarations of Chan and Gao, being reliance documents of Bloomberg, should have been submitted to the Delegate in advance of the Hearing by the date prescribed in the cover letter.

46. The Delegate then points out that Cui and Zhang, as the owners, directors and officers of Bloomberg, attended at the Hearing on behalf of Bloomberg and also retained the services of legal counsel, Wu, to represent Bloomberg at the Hearing.

47. With respect to Bloomberg’s assertion that Wu’s conclusion or “misapprehension” of Chan’s response in his interview of Chan is a separate matter from whether Chan’s evidence was available at the time of the Hearing. The Director refers to the definition of the term “available” in Webster’s New Collegiate Dictionary as “accessible, obtainable”. The Delegate argues that Chan’s evidence was available and therefore it fails to qualify as evidence that could not “with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and

prior to the determination being made” and refers to the decision in *Davies et al*, B.C. E.S.T. #171/03 in support of this assertion.

48. With respect to Gao’s Statutory Declaration, the Director states that Bloomberg’s counsel has not, in the Appeal, indicated that “Gao’s whereabouts were unknown, or that in spite of Cui’s, Zhang’s or Wu’s best efforts Gao could not be contacted prior to the Hearing”. The Director states that Bloomberg in its Appeal simply states that Gao “was absent from Canada” without more. In this regard, the Director notes that when Bloomberg was purchasing the business from its predecessor, Moriah while Ng was on vacation in Malaysia, Zhang contacted Ng and asked her if she could work for Bloomberg. The Director notes that “evidently due diligence was exercised by Zhang in her efforts to reach Ng during a time when Ng was absent from Canada” and that “one is left to reasonably conclude that Gao could also have been contacted and her evidence could have been obtained and submitted to the Delegate had Cui, Zhang or Wu exercised due diligence”.
49. The Director further states that “at no point during the Hearing did Cui, Zhang or Wu make any reference whatsoever to evidence that could have, would have or should have been provided by Chan, by Gao or by any other current or former Bloomberg employee”.
50. The Director further asserts that at the Hearing “Chye was a credible witness whose recounting of events was both logical and consistent within the Determination”. The Delegate further noted in respect of Chye’s recollection of the discussion between Zhang and Ng on April 3, 2006 that “Chye was not subjected to a vigorous challenge during cross-examination on this particular evidence by Wu”.
51. Finally, the Director submits that since Fu gave evidence for Bloomberg as a witness at the Hearing, he therefore “does not qualify as an independent third party in his role as interpreter in this Appeal” when he interpreted the contents of Gao’s Statutory Declaration for Gao from English to Mandarin before the latter executed it.
52. In Bloomberg’s response to the Director’s submissions, Bloomberg states that it is unclear from the Determination whether Chye was present and gave evidence at the Hearing. Bloomberg states that there is a suggestion in the Determination that only the written statement of Chye was admitted into evidence but he did not testify.
53. With respect to Ng’s submissions on appeal, Bloomberg indicates that there is “nothing new in the substance” of Ng’s submissions in the Appeal and that in any event, Gao’s evidence is the only evidence of an unrelated third party and should be preferred over the statement of Chye.
54. Bloomberg also submits a single letter signed by two employees, namely Chan and Yum Tong Lam who indicate that Gao was present at Bloomberg’s factory from March 6, 2006 to April 25, 2006, and working with them during the working hours on April 3, 4 and 5, 2006.
55. Bloomberg also challenges the role of the Delegate in the Appeal and alleges that the Delegate, by making submissions to the Tribunal, has taken the “posture of an advocate and seriously undermined his position of impartiality. Bloomberg also argues that the Delegate’s “submissions are argumentative and both forceful and partisan, and leave a strong impression of bias” and “(i)f it is the practice of Delegates to make submissions to the Tribunal in support of their own decisions, ...it introduces procedural bias, and the practice should be re-examined”.

56. Bloomberg also submits that the whereabouts of Gao were unknown to Bloomberg until after Gao returned to Canada after the Hearing and in support attaches a letter from Zhang, as translated by her daughter, stating that Gao did not leave Zhang any contact information and therefore Zhang was unable to contact her while Gao was in China. It also states that Zhang tried to contact Gao “during the first ten days of February 2007”. It was then that Zhang indicates she was able to “successfully” reach Gao and discovered that Gao “was working with them during the time, April 3, 2006 to April 5, 2006”, and heard the conversation between Zhang and Ng.

ANALYSIS

57. Subsection 112 (1)(c) of the Act provides that a person may appeal a determination on the ground that evidence has become available that was not available at the time the determination was being made. The subsection is not intended to allow a person dissatisfied with the result of a determination to simply seek out more evidence to supplement what was already provided to, or acquired by, the Director during the complaint process if, in the circumstances, that evidence could have been provided to the Director before the determination was made. The main or essential aspect of this ground of appeal is that the fresh evidence was not available at the time the determination was made.
58. In *Re: Merilus Technologies Inc.*, [2003] B.C.E.S.T.D. No. 171 (QL), (27 May 2003), B.C. E.S.T. #D171/03, the Tribunal, faced with the issue of whether or not to accept fresh evidence, decided that it should be guided by the test applied in civil courts for admitting fresh evidence on appeal. That test is a four-fold test as follows:
- (a) The evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
 - (b) The evidence must be relevant to a material issue arising from the complaint;
 - (c) The evidence must be credible in the sense that it is reasonably capable of belief; and
 - (d) The evidence must have high potential probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.”
59. It should be noted that the four criteria above are a conjunctive requirement and therefore the party requesting the Tribunal to admit new evidence must satisfy each of them before the Tribunal will admit the new evidence.
60. In the case at hand, on application of the four-fold test in *Merilus, supra*, I have concluded that Chan and Gao’s Statutory Declarations are:
- (a) relevant to a material issue in the complaint (ie. whether or not Ng quit her employment or her employment was terminated by Bloomberg);
 - (b) credible in the sense that they are reasonably capable of belief (notwithstanding that they may be challenged by the Respondent, Ng); and

- (c) of high probative value in that they would have provided the Delegate with conflicting information on a critical issue which could have led the Director to a different conclusion, if believed.

61. However, for the reasons that follow in my Decision, I am not satisfied that Bloomberg has met the first criterion in the *Merilus* test, namely, the evidence contained in the Statutory Declarations could not, with the exercise of due diligence on the part of Bloomberg, have been discovered and presented to the Director during the investigation or adjudication of the Complaint and prior to the Determination being made.
62. In the case of Gao's Statutory Declaration, I am not satisfied from the evidence presented that Bloomberg exercised due diligence to contact Gao. Zhang, in her letter of April 17, 2007 (which Bloomberg's counsel submitted in response to the Director's submissions on appeal), states that Gao did not give her any contact information and therefore she was unable to contact Gao or locate her in China. Bloomberg did not present any evidence of what specific efforts Zhang or anyone else on Bloomberg's behalf made to contact Gao or to discover her whereabouts in China before the Hearing and also before the Determination. Zhang apparently had contact information of Gao in Vancouver as Zhang states in her letter "(w)ithout knowing ... whether Jing Gao came back to Vancouver or not, Li Hua Zhang has tried to contact ... Jing Gao during the first ten days of February 2007." It would appear that the first attempt to contact Gao by Zhang was in early February 2007. These efforts, incidentally, were fruitful as Zhang was able to speak with Gao, the latter having returned to Vancouver in December 2006. Why Zhang did not make an attempt to contact Gao after Gao was back in December 2006 or before the Determination on January 29, 2007 is not explained in Gao's letter or Bloomberg's submissions in its appeal.
63. As a result of Zhang's successful contact with Gao in early February 2007, the information Zhang obtained from Gao ultimately made its way into Gao's Statutory Declaration presented by Bloomberg in its appeal. What is curious about Zhang's letter is that she indicates in it that when she was able to contact Gao, she asked Gao "whether she was working with them during the time April 3rd, 2006 to April 5th, 2006". Gao is one of the owners of Bloomberg and as such she would surely have had access to payroll records of Bloomberg at all times which would have allowed her to determine, at least as early as when Bloomberg was notified of Ng's filed Complaint against Bloomberg, whether Gao was working on the dates in question and then to make attempts to contact Gao, at least locally. From reading Zhang's letter there is no indication whatsoever of any actual attempts to contact Gao until after the Determination. Moreover, if Zhang had determined from checking the relevant payroll records of Bloomberg that Gao was working on the relevant dates in question and wanted to speak with Gao before the Hearing to determine what, if anything, Gao knew of the discussions between Zhang and Ng on the dates in question then Zhang could have asked the Delegate for an adjournment of the Hearing while it made attempts to locate Gao or contact her. However, Zhang or Bloomberg made no such efforts. It was only after the Determination was made against Bloomberg that the latter, through Zhang, contacted Gao locally. In the circumstances, I am not satisfied that the evidence of Gao could not, with the exercise of due diligence on Bloomberg's part, have been discovered and presented to the Director during the investigation or adjudication of the complaint and at least prior to the issuance of the Determination on January 29, 2007. Accordingly, I cannot admit nor consider Gao's evidence on appeal.
64. With respect to Chan's evidence, Bloomberg's then counsel, Wu, interviewed her before the Hearing, but decided not to inquire of Chan as to whether or not she was privy to "the entire conversation between Mrs. Zhang and Irene Ng", because Chan indicated to Wu that she had not "participated" in a conversation with Mrs. Zhang and Irene Ng on April 3, 2006". Bloomberg states that Wu

“misapprehended” the evidence of Chan and “reasonably concluded that Lily Chan’s answer also meant that she did not overhear the conversation, which was not the case”. In my opinion, the evidence of Chan, pertaining to the discussions between Zhang and Ng on April 3, 2006 contained in her Statutory Declaration, was available to Bloomberg in advance of the Hearing in the sense that Bloomberg had access or an opportunity to obtain that information, although Bloomberg, in advance of the Hearing, did not know Chan’s evidence because Wu did not probe that area.

65. Further, it should be noted that Chan’s Statutory Declaration goes beyond simply recounting what she overheard on April 3, 2006. In that, in paragraph 2, she states that on or about April 5, 2006, when she and Ng were working on either side of the packing table and Zhang was working at the end of the table, Ng gestured with her hands for Zhang to come and talk with her by the order desk and after Ng and Zhang spoke at the order desk, Ng came by the packing table and she overheard Ng say “ ‘I don’t want to work here anymore’ and she packed her things and left”. Chan further adds that this “was Irene’s last day at work”. In his letter, Wu does not say that, in his interview of Chan before the Hearing, he made any inquiry of Chan with respect to her knowledge of the events of April 5, 2006, which Chan shares in paragraph 2 of her Statutory Declaration. This is material evidence going to the penultimate issue of whether Ng resigned from her employment or was terminated by Bloomberg and the latter wants to introduce this evidence as new evidence for the first time in the appeal and there is no explanation of why this evidence could not, with the exercise of due diligence by Bloomberg, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made. Surely if Bloomberg’s current counsel was able to obtain the “new evidence” contained in Chan’s Statutory Declaration, then Bloomberg could have, with due diligence, obtained such information through its previous counsel. Section 112(1)(c) of the Act, in my view, does not allow a party dissatisfied with a determination to subsequently perform a more thorough investigation and present at the appeal of the determination, as “new evidence”, evidence that was otherwise “available” to it prior to the hearing or before the determination. Therefore, I am unable to admit the evidence of Chan on appeal.

Additional Matters

66. Bloomberg has raised a few other issues in its submissions in reply to the Director’s submissions in the appeal. I will address these issues below.
67. First, Bloomberg indicates that both Ng’s and Chye’s evidence was available at the time of the Hearing and that no further evidence should be accepted from them on this Appeal. Bloomberg also suggests that there was some confusion as to whether or not Chye was in attendance at the Hearing and cross-examined. My review of the Determination leads me to conclude that Chye was indeed in attendance at the Hearing. In particular, in paragraph 2 of the Determination, the Director notes that attending on behalf of Ng was her husband, Chye. Furthermore, at page 9 of the Determination, the Director states “Chye was not subjected to any vigorous challenge during cross-examination on this particular evidence by Wu”. This to me indicates that Chye was not only in attendance at the Hearing, but that he was cross-examined at the Hearing by Bloomberg’s counsel. Having said this, with respect to Bloomberg’s submission that Ng and Chye’s evidence should not be considered in the appeal, I did not have to consider the said evidence in context of my determination of the issue of whether or not Bloomberg’s “new evidence” should be accepted. Further, in light of my decision not to admit the “new evidence” put forth by Bloomberg, it is not necessary for me to examine the admissibility of Ng and Chye’s evidence.

68. With respect to the Director's challenge to Fu's role as an interpreter for Gao in light of Fu's role as a witness for Bloomberg at the Hearing, again, I need not rule on that issue in light of my decision not to admit Gao's evidence.

69. Finally, Bloomberg's counsel challenges, in a very serious way, the role of the Delegate in this case in making submissions in support of his Determination in Bloomberg's appeal. In particular, Bloomberg's counsel alleges that the Delegate "has taken the posture of an advocate and seriously undermined his position of impartiality" and that "his submissions are argumentative and both forceful and partisan and leave a strong impression of bias". Bloomberg's counsel also states that since the "Delegate has assumed the role of an advocate for the employee, he has undermined his ability to continue as an impartial adjudicator if the matter is referred back to him for further hearing". However, I am not submitting this matter back for re-hearing in light of my decision not to admit Bloomberg's "new evidence". I will, however, address the concern expressed by Bloomberg's counsel in regard to the conduct of the Delegate of the Director in the appeal. The Tribunal in *BWI Business Incorporated*, B.C. E.S.T. #E050/96 delineated the principles governing the role of the delegate of the Director in an appeal as follows:

1. The Director is not the statutory agent for the employee(s) named in the determination.
2. The Director is entitled to attend, give evidence, cross-examine witnesses and make submissions at the appeal hearing.
3. The Director's attendance and participation at the appeal hearing must be confined, however, to giving evidence and calling and cross-examining witnesses with a view to explaining the underlying basis for the determination and to show that the determination was arrived at after full and fair consideration of the evidence and submissions of both the employer and the employee(s).
4. The Director must appreciate that there is a fine line between explaining the basis for the determination and advocating in favour of a party, particularly when one party seeks to uphold the determination.
5. It will fall to the Employment Standards Tribunal adjudicator in each case, given the particular issues at hand, to ensure that the line between explaining the determination and advocating on behalf of one or the other of the parties is not crossed.
6. It will also fall to the adjudicator to ensure that all relevant evidence is placed before the Tribunal for consideration.

70. In the case at hand, while the Delegate of the Director may have been a little more "forceful" in his appeal submissions than perhaps necessary, I do not think that the Delegate crossed the line between impartiality and advocating for the Complainant. In my view, the Delegate, in his submissions, was explaining the underlying basis for the Determination and trying to show that the Determination was arrived at after full and fair consideration of the evidence and submissions of both Bloomberg and Ng. It is also open to the Delegate to make submissions on any fresh issues raised by the Bloomberg in the appeal such as the request to admit new evidence, particularly when the request is related to Bloomberg's request for cancellation of the Determination. Again, while the Delegate may have been a little more "forceful" than necessary in his submissions on this issue, the Delegate did not act in an impartial manner.

71. The Appeal is dismissed.

ORDER

- ^{72.} Pursuant to Section 115(1)(a) of the Act, I order that the Determination dated January 29, 2007, confirmed, together with any interest that has accrued under Section 88 of the Act.

Shafik Bhalloo
Member
Employment Standards Tribunal