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-

John Robert Dacre

("Dacre")

- of a Determination issued by -

The Director of Employment Standards

(the "Director")

ADJUDICATOR:	Kenneth Wm. Thornicroft
FILE Nos.:	97/483 & 98/91
DATE OF DECISION:	July 15, 1998

DECISION

OVERVIEW

The matter now before involves an appeal brought by John Robert Dacre ("Dacre") pursuant to section 112 of the *Employment Standards Act* (the *"Act"*) from a Determination issued by the Director of Employment Standards (the "Director") on June 17th, 1997 under file number 39272 (the "Determination").

The Director determined that Dacre failed to prove that his former employer, Intercan Food Corporation ("Intercan"), owed him any unpaid vacation pay and, accordingly, dismissed Dacre's complaint. Dacre appealed and following an oral hearing held on September 12th, 1997, I issued a written decision holding that on or about May 21st or 22nd, 1997 Dacre and Intercan reached a binding settlement agreement whereby Intercan agreed to pay Dacre the sum of $3,600 on account of his unpaid vacation pay claim (this sum represented 6% of Dacre's annual salary). In light of this agreement, I ordered that the Determination be varied to reflect Intercan's liability to Dacre in the amount of $3,600 plus interest to be calculated pursuant to section 88 of the *Act.*

The Director applied for reconsideration of my decision [see section 116(2) of the *Act*]; Intercan apparently took no position as it did not, despite being requested to do so, file any submission with respect to the Director's request for reconsideration and did not, itself, seek reconsideration.

A three-person reconsideration panel concluded that in accordance with section 78(3) of the *Act,* the settlement reached between the parties was void and thus I erred by, in effect, "breathing life" into the parties' settlement agreement and varying the Determination to reflect the terms of that settlement. In accordance with section 116(1)(b), the reconsideration panel referred the following issue back to me for decision:

> "...the original decision will be varied to the extent that it incorporated the terms of the settlement. The Adjudicator did not canvas the question of whether Intercan in fact owed Dacre for unpaid vacation pay. That question is referred back to the Adjudicator under Section 116(1)(b)."

FACTS

The essential facts, as originally determined by me, are not in dispute and were not challenged on reconsideration. I quote from my original decision:

> Intercan operates a small chain of restaurants under the trade names the "Sirloiner" and "Goodfella's Linguini Grill". At one time the chain included seven restaurants although presently there are only three active locations.

Dacre's complaint to the Employment Standards Branch only concerned his claim for vacation pay; he has now also filed a claim for severance pay in the B.C. Supreme Court although this latter action has not been set for trial, nor have any discoveries been conducted as yet.

As noted above, Intercan asserts that Dacre never was in its employ. However, if a settlement agreement was concluded between Intercan and Dacre regarding the latter's vacation pay claim, the issue of Dacre's employment status is not particularly relevant so long as Intercan agreed to pay his unpaid vacation pay. In any event, I am satisfied that Dacre *was*, insofar as the *Act* is concerned, an employee of Intercan.

The evidence with respect to the settlement agreement is not contentious.

According to Dacre, during a telephone conference call between Ken White, the Director's delegate in this matter, Dacre and Koonar (which took place on either May 21st or 22nd, 1997) the parties agreed to settle Dacre's claim upon payment of $3,600 (*i.e.,* 6% of Dacre's annual $60,000 salary). When White indicated that it would be inappropriate for him to contact Intercan's controller directly in order to arrange for delivery of the funds, Koonar said that he would attend to that matter. It was agreed that a cheque, made payable to Dacre, would be sent directly to White for subsequent transmittal to Dacre.

After returning from vacation, Dacre telephoned White to inquire about the whereabouts of the funds. White then apparently telephoned Koonar about the matter only to be told that "it was no longer in his hands" and that it was up to Constabaris to authorize payment. I might parenthetically note that at this point in time Koonar held the office of vice-president of Intercan and would appear to have had the legal authority to bind that firm to an agreement of the sort alleged by Dacre. In any event, Intercan failed to deliver the funds and in short order the Determination was issued--the Determination contains no reference whatsoever to the alleged settlement agreement.

Koonar, who was appointed an Intercan vice-president in 1989, did not challenge in any fashion Dacre's evidence regarding the alleged settlement agreement; indeed, Koonar frankly conceded that Dacre's recollection of the events was accurate. Koonar's position was simply that Intercan did not have sufficient records in its possession to justify paying Dacre any vacation pay. For his part, Constabaris' evidence did not touch on the alleged agreement; Constabaris' main point was to assert that Dacre was not employed by Intercan but rather by Lan Can Food Corp., a related company.

ANALYSIS

As noted in the above recitation of the relevant facts, Intercan never challenged Dacre's entitlement to vacation pay. In the original appeal hearing before me, Intercan advanced two principal defences to Dacre's claim. First, the "settlement" agreement was entered into on behalf of Intercan by an officer who lacked authority to do so. I rejected that submission and that finding has not been disturbed by the reconsideration panel. Second, Intercan asserted that Dacre never was an Intercan employee--as noted above, I also rejected that submission and, once again, that finding has not been set aside by the reconsideration panel.

With respect to the issue that is now before me, namely, whether or not Dacre is entitled to be paid vacation pay, I note that the only defence advanced by Intercan in this regard was that "Intercan did not have sufficient records in its possession to justify paying Dacre any vacation pay". There was no evidence before me that Dacre was paid the three weeks' vacation pay he claimed and, indeed, the employer was not in a position to refute Dacre's allegation given its position that Dacre was not an Intercan employee. In the absence of any evidence that Dacre was paid the three weeks' vacation pay he claimed, and in the face of Dacre's apparently credible testimony, I can only conclude that Dacre, a nine-year employee at the time of his dismissal, is entitled to an order in his favour for $3,600 (6% of his acknowledged--see Intercan's undated letter submitted to the Tribunal on July 28th, 1997--annual salary of $60,000).

However, I also wish to make some comments concerning this particular application for reconsideration. I commence by noting that the issue raised in the Director's reconsideration request, namely, the effect of section 78(3), was never argued before me. Indeed, the Director failed to attend the original appeal hearing and did not make any submissions whatsoever regarding the possible application of section 78(3) to the case at hand. As noted in my original decision, the parties' settlement is not even mentioned in the Determination. Dacre's appeal very clearly set out his view that the matter of his vacation pay claim was the subject of a binding settlement agreement; indeed, that submission constitutes the primary thrust of his appeal. Upon being advised of the appeal (and provided with a copy of Dacre's appeal form and supporting documents), the Director's delegate sent the following memorandum to the Tribunal on August 8th, 1997:

> "Thank you for the NOTICE OF HEARING regarding this matter. A review of the file of the Director of Employment Standards indicates our file is closed. As this matter does not appeal [sic, this should probably read "appear"] to turn on an interpretation of the Employment Standards Act but the evidence the Delegate of the Director will not be attending the hearing."

In other words, the Director's delegate appeared to have conceded that the issue on appeal was, primarily, an evidentiary one--whether or not a binding settlement had been reached between the parties. The Director could have and, in my view, should have raised the section 78(3) issue at the original appeal hearing.

I disagree, for the reasons set out below, with the reconsideration panel's interpretation of section 78 of the *Act.* In fairness to the panel, and as previously observed, the panel proceeded without having had the benefit of any contrary submission on the legal effect of section 78(3).

Section 78(1)(a) authorizes the Director to "assist in settling a complaint"; pursuant to subsections 78(1)(b) and (c) the settlement funds may be paid directly to the employee or remitted to the Director for subsequent transmission to the employee [see 78(2)]. Section 78(3) provides as follows:

> (3) If a person fails to comply with the terms of a settlement, the settlement is void and the director may
>
> > (a) determine the amount the person would have been required to pay under section 79 had the settlement not been made, and
> >
> > (b) require the person to pay that amount.

In its original written request for reconsideration, dated February 3rd, 1998, the Director "accept[ed] that there was a settlement agreement" but maintained that, because Intercan failed to pay the monies owed to Dacre pursuant to that agreement, the delegate was entitled to treat the settlement as void and then dismiss the complaint as unfounded following an appropriate investigation. Certainly, that is one possible interpretation of section 78(3) but, in my view, that interpretation is incorrect.

One must consider section 78(3) in light of the overall scheme of the *Act* and the "mischief" (a well-established concept of statutory interpretation) to which it is directed. Section 78(1) specifically authorizes the Director to assist in settling claims. By their very nature, settlements imply that one or the other party (often both) obtain something less than that which they were originally seeking. In the case of a settlement of a wage claim, inevitably, the employee is accepting less than the full amount of their claim; otherwise, why settle?--the employee would be better off with a determination in his or her favour for the full amount of their claim. Of course, employees often settle because a determination is not cash in hand and many a monetary judgment has proven to be just another piece of paper.

In the ordinary course of events, parties honour their settlements. Once a settlement of the employee's claim has been reached, there is likely no reason to continue the investigation--indeed, the Director has been given the specific statutory authority to let the settlement stand and "stop...investigating [the] complaint" [see section 76(2)(g)] at which point the employee could then simply proceed to enforce the settlement either with or without the Director's assistance. But what if one party (in this case, the employer) refuses to honour a valid settlement of a disputed claim? I might add that once a settlement of an employee's wage claim has been reached, only the employer, for all practical purposes, is in a position to determine whether it will be honoured--the employer either pays the monies due under the settlement or it does not.

In my view, the effect of section 78(3) is to preserve an option to claim the full amount of the wages owed if, as was the case here, the employer refuses to honour the compromise reached. Subsections 78(3)(a) and (b) only have meaning in the context of creating an incentive on the part of the employer to honour the settlement--if the settlement is breached, the employer may be held liable, via a determination, for the full amount of the employee's claim. Subsections 78(3)(a) and (b) make absolutely no sense in a situation where, as here, the Director subsequently determines that the amount owing to the employee is $0. How can a person be "required to pay" $0?

I acknowledge that section 78(3) is curiously drafted--if the settlement funds are not paid "the settlement is void" but then the Director is given a discretion ("the director may") to ascertain the amount due under any Determination that may subsequently be issued. I would hold that in exercising the discretion given under section 78(3) the Director should only issue a determination for the settlement amount or some greater amount (*i.e.,* the actual amount found to be due). Once a settlement of the employee's wage claim has been reached, the settlement amount can be characterized as "wages" under section 1 given that the settlement funds represent "money...payable by an employer to an employee for work". As such, in my view, the settlement funds represent the *minimum* amount the employer "would have been required to pay under section 79".

ORDER

Pursuant to section 115 of the *Act,* I order that the original Determination issued in this matter be be varied to reflect an amount due to Dacre of $3,600 together with interest to be calculated by the Director in accordance with section 88 of the *Act.*

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Kenneth Wm. Thornicroft, ***Adjudicator***
Employment Standards Tribunal