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 No.: 97/483

DATE OF HEARING: September 12th, 1997

DATE OF DECISION: October 29, 1997

DECISION

APPEARANCES

John Robert Dacre on his own behalf

Robert Constabaris, President

and David Koonar, General Manager for Intercan Food Corporation

OVERVIEW

This is 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 had failed to prove that Intercan Food Corporation ("Intercan" or the "employer") owed him any unpaid vacation pay and, accordingly, dismissed his complaint.

Dacre appeals this dismissal on the basis that the Director failed to give effect to a prior settlement of his vacation pay claim. As I understand Intercan's position, it says that firstly, Dacre never was an Intercan employee; secondly, it says that it is not bound by the settlement agreement reached between the parties.

The appeal was heard at the Tribunal's offices in Vancouver on September 12th, 1997 at which time I heard evidence and submissions from Dacre, on his own behalf, and from Robert Constabaris and David Koonar, Intercan's President and General Manager, respectively, on behalf of Intercan.

FACTS AND ANALYSIS

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.

Thus, the uncontradicted evidence before me is that the parties--Intercan and Dacre--on either May 21st or 22nd, 1997 reached a settlement with respect to Dacre's vacation pay claim. As such, this agreement represents wages that were payable to Dacre and, accordingly, given the employer's refusal to pay, should have been crystallized into a Determination in favour of Dacre. There is no reason, in fact or in law, to question Koonar's authority to conclude the settlement on behalf of Intercan and thus, in my view, Dacre is entitled to an order reflecting the terms of settlement.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination be varied in the amount of **\$3,600** together with interest to be calculated by the Director in accordance with Section 88 of the *Act*.

Kenneth Wm. Thornicroft Adjudicator Employment Standards Tribunal