

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 256/10  
5157097

BETWEEN JULIE STACEY  
Applicant

AND JAGAR MANAGEMENT LTD  
Respondent

Member of Authority: Dzintra King  
Representatives: David Flaws, Advocate for Applicant  
Jennifer Braithwaite, Counsel for Respondent  
Investigation Meeting: 26 January 2010  
Witness Interview: 17 April 2010  
Submissions Received: 7 May 2010 from Applicant  
20 May 2010 from Respondent  
Determination: 27 May 2010

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] The applicant, Ms Julie Stacey, says that she was offered employment by the new owner of Gybe Restaurant; and that she was unjustifiably dismissed. The respondent, Jagar Management limited (“Jagar”) says that Ms Stacey was never an employee and so is not entitled to bring a personal grievance.

[2] An employee includes a “person intending to work”, which is defined as “a person who has been offered, and accepted, work as an employee; and intended work has a corresponding meaning”.

[3] Ms Stacey had been employed by Fun Concepts Ltd as a chef at Gybe Restaurant. Jagar Management Limited entered into a conditional agreement with

Gybe Restaurant to buy Gybe Restaurant from Fun Concepts Ltd in late May 2008. That agreement was conditional upon the completion of due diligence.

[4] The agreement contained the following terms:

*The party's (sic) record the purchaser is not agreeing to employ any of the staff currently employed by the vendor in the business, and the purchaser accepts no responsibility for any obligations of the vendor to any of those employees.*

[5] This clause is a handwritten addition to the agreement which was signed about a week prior to the purported offer of employment being made in early June.

[6] Ms Stacey said that late in May 2008 Vicki and Graham Cundy, who were the owners of Gybe Restaurant, told her it was going to be sold and that her future employment was uncertain. Mr Cundy told her that there were difficulties in finalising the sale. Mr Cundy told her that Ms Adele Meaker, the director of Jagar Management Ltd, was intending to keep on all the employees bar one. Ms Stacey said that she first met and spoke to Ms Meaker upstairs on the verandah at Gybe. Mr and Mrs Cundy and Ms Meaker's partner were also present. She said the conversation was general and covered the normal operation of the restaurant, the duties of staff, menus and how things should be done. Ms Meaker asked her for her opinion about other staff members.

[7] Ms Stacey recalled that Ms Meaker was uncertain about taking on one employee. Mr and Mrs Cundy had input to the discussion and assured Ms Meaker that Ms Stacey was the first chef they had had who was willing to take direction about menus. Ms Stacey said Ms Meaker gave her a clear understanding that she was intending to keep the staff on and she had nothing to make her doubt what Mr Cundy had told her about her job being safe.

[8] She left the meeting and went downstairs to the kitchen. Lunch service was just finishing and everyone was out on their break. She went out to join them and had a talk about what had happened. Soon after that they went home because they were on split shifts and she went back inside. A few minutes later Ms Meaker and her partner came into the kitchen and began to look over the plant and chattels. Ms Meaker's partner left to look over the front of house and Ms Stacey had a long conversation with Ms Meaker as they stood in the kitchen.

[9] Ms Stacey said that quite earlier in the conversation Ms Meaker asked Ms Stacey directly “*are you willing to stay on for at least two years?*” Ms Stacey said she had replied yes, that she was happy there and they had a great kitchen team. They then spoke again at length about the restaurant’s existing clients and the need to cater for a particular crowd. Ms Meaker told her she would want input to the menu and she agreed to work with her on it. She took her phone number. Ms Stacey went home very happy knowing that she still had a job after the sale and didn’t have to worry for two years. Ms Stacey deposed that it was solely this exchange that led her to believe that she had been offered employment.

[10] She did not hear from Ms Meaker during the following week but was not concerned about that. On 12 July Ms Stacey along with other staff members received a letter from Mr Cundy. This letter advised that her employment with Fun Concepts was being terminated; the last day of employment was to be 20 July 2008 with the new owners taking possession on 21 July. The letter stated:

*As you know the sale was to be come unconditional on the 27th of June. However the purchaser has for various reasons delayed making the sale unconditional. Our lawyers have now advised us that the sale became unconditional at 4.30pm yesterday, so we are now able to confirm that your employment with us will cease as previously advised.*

*The prospective owners have spoken with you individually, and indicated your ongoing employment prospects with them and with few exceptions we understood that you would be offered employment. We are now greatly disappointed to tell you that they have in the last few days advised us that they will not now be giving you employment.*

[11] Mr Cundy did not give evidence. It appears that the staff of Gybe Restaurant were unaware of the clause in the sale and purchase agreement relating to re-employment of staff. It also appears likely that Mr Cundy had given his staff information that was contrary to the provisions of the sale and purchase agreement. The letter does not state that Mr Cundy understands that staff had been offered employment but that they would be offered employment.

[12] Ms Meaker said that to the best of her recollection she had spoken to Ms Stacey on two occasions before the contracts went unconditional. The first was on about 9 June when she was introduced as the prospective purchaser to each of the current staff members by Mr Cundy. Mr Cundy asked each of the staff members to

come up and meet her and she had a very brief discussion with each of them. Mr Cundy was present when those discussions took place.

[13] When she met with Ms Stacey she did not talk to her about having a job with Jagar if the contract became unconditional. She did not make any arrangements with Ms Stacey nor did she inspect the kitchen on that visit. At that point the agreement remained conditional upon the completion of due diligence and there were no jobs in existence to offer.

[14] The second discussion was in early July, also before the contract became unconditional, when she made arrangements with Mr Cundy to inspect the plant, fittings and other features of the restaurant for the first time. She came into the kitchen where Ms Stacey was present and asked about the kitchen layout and operation of the kitchen and various cooking appliances. Mr Cundy was also present for the majority of the time she was in the kitchen. Again there was no discussion with Ms Stacey about her role or whether Jagar would offer her employment if the purchase went ahead.

[15] Ms Meaker said that she went to the restaurant on a couple of occasions following this but did not recall speaking to Ms Stacey again apart from a brief discussion on 15 July. On that day she went to the restaurant and spoke to Ms Stacey and told her she was meeting someone to inspect the kitchen. The person she was meeting was from Northtech and she was interested in offering that person employment as a chef. Ms Stacey did not say anything to her about the claim that she had offered her a job. Mr Cundy arrived at the restaurant shortly afterwards and he did not say anything to her about that either.

[16] Ms Cahill gave evidence regarding what had been said to her by Ms Stacey. I agree with Ms Braithwaite's submissions that her evidence was inconsistent.

[17] Mr Lewis, who was interviewed after the hearing, that Ms Meaker had told him that she would want him and the staff to work for her. He said there had not been a specific offer of employment and that he had seen the offer as being Ms Meaker saying she would be happy for him to work for her. There was no discussion regarding terms and conditions of employment and when this conversation took place the contract remained conditional.

**Decision**

[18] Was Ms Stacey a person intending to work; and did the words that Ms Stacey says that Ms Meaker said to her “*are you willing to stay on for at least two years*” and her reply of “*yes*” constitute acceptance and offer? Ms Stacey said that was what she relied on in terms of believing that she had been offered employment. She told me there had been no discussion about terms and conditions of employment nor had there been any reference to salary that might be paid.

[19] In *Canterbury Hotel etc IUOW v The Elms Motor Lodge Ltd* [1989] 1 NZILR 958 the Labour Court considered the definition of “worker” under the Labour Relations Act 1987. The Court held that there had to be a fully concluded employment contract, including offer, acceptance, consideration and intention to enter into a binding legal relationship.

[20] It is for the applicant to persuade the Authority that it is more likely than not that that is what happened: *Buchanan v R & J Little Ltd t/a Subway Hamilton*, AA259/04, 16 August 2004.

[21] Even if Ms Meaker had asked Ms Stacey whether she would she be prepared to stay on for a period of two years, that in itself does not constitute an offer of employment. If this conversation took place it was a discussion and not an offer and acceptance of employment. No terms were discussed. No legally binding offer was made.

[22] There was neither offer nor acceptance of employment. As Ms Stacey was not a person intending to work she was not dismissed and does not have a personal grievance.

**Costs**

[23] If the parties are unable to resolve the issue of costs the respondent should file a memorandum within 28 days of the date of this determination. The applicant should file a memorandum in reply within 14 days of receipt of the respondent's memorandum.

Dzintra King  
Member of the Employment Relations Authority