IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 23/08
5090292

	BETWEEN	JOANNE JAMES Applicant
	AND	COONEY FINANCIAL SERVICES LIMITED Respondent

Member of Authority:	R A Monaghan
Representatives:	Julie Hardaker, Counsel for Applicant Prue Dawson, Counsel for Respondent
Investigation Meeting:	19 November 2007 at Hamilton
Submissions received:	11 December 2007 from Applicant 14 December 2007 from Respondent
Determination:	25 January 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Joanne James says her former employer, Cooney Financial Services Limited ("CFSL") dismissed her unjustifiably. CFSL denies entering into an employment relationship with Ms James.

The parties' association

[2] Ms James works as an insurance advisor. From 1995 she had worked in association with David Cooney, who is also an insurance advisor and the managing director of CFSL. Both operated their own businesses and had their own clients and agencies, although Ms James used CFSL's office space and had access to some of CFSL's lower level clients. In April 2005 Ms James and CFSL entered into a written rental and commission agreement which set out, among other things, how

commissions and bonuses would be apportioned when Ms James carried out work for clients of CFSL's. It was common ground that none of this amounted to an employment relationship between the parties.

[3] In March 2006 a well-known person in the insurance advisory industry produced a draft outline of a new concept for the industry. As the concept was developed it was the subject of ongoing discussion in the industry. On 28 September 2006 the originator met with Mr Cooney to further discuss the concept – by then named Triplejump – with a view to Mr Cooney becoming the first Triplejump franchisee.

[4] Mr Cooney found the idea exciting and had a number of discussions about it in the office. He said in evidence that the discussions were ongoing and informal. They involved both staff and contractors associated with CFSL and amounted to generalised discussion about the concept as it developed, and its implications. They included conversations with Ms James in which Mr Cooney advised Ms James that Triplejump franchisees were not permitted to engage contractors, so that if she wished to be part of Triplejump she could do so only as an employee of CFSL's. He had similar conversations with another advisor associated with CFSL but operating as an independent contractor, Nicola McGregor.

[5] Ms McGregor did not interpret the conversations she had at that relatively early stage as amounting to an offer of employment to her, but Ms James reached a different conclusion about significance of the conversations involving her. She believed they amounted to an offer of employment. Although she did not diarise it, Ms James said there was a formal meeting in or about August or September 2006, when Mr Cooney asked if she wanted to be part of Triplejump. She was told she had a choice – either she could be 'in' which meant she would become an employee of CFSL's, or if she did not wish to participate she could not continue to work from the CFSL offices. The vagueness in her evidence about the date and time of the meeting, and her failure to diarise it when other meetings were diarised, leads me to consider it more likely than not that she was referring to a generalised conversation such as those Mr Cooney and Ms McGregor described, rather than a formal meeting held expressly to offer employment to Ms James.

[6] Moreover some time was spent during the investigation meeting attempting to better identify when this critical meeting occurred. In the course of those exchanges it emerged that early drafts of a written franchise agreement were presented to CFSL in September and early October 2006. It was subsequently submitted on behalf of Ms James that an employment agreement was reached in association with the presentation of the draft franchise agreements. There was no evidence of any such direct link. Although the overall evidence of the timing of the generalised conversations was not specific as to date, nor was there any evidence that conversations concerning Triplejump's attitude to contractors began after the franchise agreements were provided to CFSL. All I can say is that I accept Mr Cooney discussed developments in the Triplejump concept as they arose, such discussions probably began between March and September 2006, and they continued during and after September 2006. I draw no inferences from the dates of the presentation of the draft franchise agreements.

[7] Ms James said that, after giving the matter considerable thought, she decided to become an employee of CFSL. She said that when she met with Mr Cooney again she told him she was 'in'. Again she was unable to specify when she gave this information to Mr Cooney.

[8] According to Ms James, from 'then on' the discussions were 'based on an employment relationship'.

[9] Ms James' further evidence was that there was a discussion about what would happen to existing clients and how commissions would be treated, as well as some of the wider implications of her becoming an employee. She also asked what income she would be expected to generate if she became an employee.

[10] Although Ms James' evidence about the date of that discussion was vague, I consider it likely the discussion occurred during a meeting which Mr Cooney said went ahead on 10 October 2006. Ms James had also diarised the meeting and I accept the date as correct.

[11] On 9 October Mr Cooney had asked Ms James for a 'quick chat about the Triplejump proposal'. I take that as the purpose of the 10 October meeting from his point of view.

[12] Neither party had a full or clear recollection of the meeting, but as a follow up to it Mr Cooney sent Ms James an email message dated 11 October saying:

> "It would be very helpful if you would be kind enough to provide the following information to assist with planning and also to help me to make up my mind as to a final decision re: Triplejump.
>
> 1. API for the past 12 months
> 2. Estimated API for next 12 months on current basis
> 3. Estimated API next 12 months under Triplejump as discussed (sharing client base)
> 4. Ideally, how many weeks per year you would prefer to work
> 5. Approximately what is your average premium sale for risk and for medical
> 6. What % of your API is pure risk and what is medical."

[13] One of Mr Cooney's reasons for seeking that information was to identify the likelihood of Ms James generating enough income to justify entering into an employment relationship. That was one of the reasons why Mr Cooney referred in the email message to the fact the information was being requested to assist with planning and help 'make up his mind' about Triplejump. He had the same purpose when he sought corresponding information from Ms McGregor, who provided it. Accordingly, at that point Mr Cooney had not reached any decision about whether there was a position to offer Ms James or Ms McGregor, let alone had he made an offer. Moreover, his reference to the need to 'make up my mind about Triplejump' should have reinforced to Ms James that nothing had been finalised regarding the Triplejump franchise or her associated entry into an employment relationship with CFSL.

[14] Another reason for the request was that the draft franchise agreement, which by then Mr Cooney had seen, included minima regarding performance. Mr Cooney sought to identify whether he could meet the franchise's requirements and make it pay.

[15] Ms James interpreted the conversation as amounting to discussion about what her remuneration would be. She did not provide Mr Cooney with any of the information he asked for, rather in response to further requests she simply indicated she would accept 'the minimum'. Mr Cooney did not know what she meant by that, and I accept the meaning was not made any clearer to him when it was explained.

[16] The meaning of 'minimum' was not clear from the evidence either, but it emerged after detailed questioning that Ms James was referring to what she understood to be a tool contained in the Triplejump materials. She said she was told Triplejump had provided software relating production to profitability, and a scale was incorporated in it. She meant she would accept the minimum set out in the scale. I have no hesitation in finding there was no agreement between the parties that Ms James' remuneration would be 'the minimum' in those terms. At best, to the extent that the relationship between productivity and profitability was discussed, Mr Cooney was continuing his practice of discussing with his associates aspects of the Triplejump proposal.

[17] Moreover, Ms James decided not to provide the requested information to Mr Cooney. She did so because she did not wish to disclose to him details of her own business. That in turn inhibited Mr Cooney's ability to reach a conclusion about whether to offer employment to her, and eventually the lack of information became a concern.

[18] The franchise agreement was signed on 10 November. Ms James believes that by then agreement had already been reached regarding entry into an employment relationship.

[19] Another insurance advisor, who was known to CFSL and its associates, signed a franchise agreement at about the same time as Mr Cooney. Shortly afterwards that person exercised an 'out clause' in the agreement, and his action was the subject of discussion in the CFSL office. Ms James said the action caused Mr Cooney to ask her to reconfirm her commitment to Triplejump, which she did. Mr Cooney denied requesting any reconfirmation of commitment, saying he merely expressed disappointment about the person's decision.

[20] It was also Ms James' evidence that, on more than one occasion, Mr Cooney mentioned a need to finalise a written employment agreement. She was not specific about when, except to say the last occasion was in the week before Christmas. She told Mr Cooney she would need advice about the agreement, and Mr Cooney agreed. It was, in effect, common ground that there was a discussion about written employment agreements at about that time and that Ms James would take any agreement to her solicitor, but Mr Cooney said Ms James was the one who raised the matter. He acknowledged a written employment agreement would be necessary.

[21] Mr Cooney intended to begin trading under the Triplejump name in early 2007. Ms James asserted that her status as an employee would commence then, but even she did not assert that Mr Cooney said to her that the employment relationship would begin then. There was no evidence of any express agreement to that effect. I consider it likely Ms James assumed that would be the case on the basis of her assumption that the parties had made an employment agreement, her knowledge of Mr Cooney's intention regarding the date when trading as Triplejump would commence, and her participation in preparations for the changeover.

[22] Triplejump offered training sessions in its procedures during November and December 2006. After signing the franchise agreement Mr Cooney invited all staff, including Ms McGregor and Ms James, to participate in the sessions. He said Ms James was not required to attend. I accept that was so, but the invitation reinforced Ms James' conclusion concerning entry into an employment relationship. She was not able to attend a session in mid-November, but attended sessions in late November and mid-December.

[23] On 11 December 2006 Ms McGregor and members of the CFSL staff signed what were described as confidentiality agreements in respect of Triplejump. Ms James signed such an agreement on 18 December. The agreements were distributed by the CFSL office but were prepared and provided by Triplejump. Ms James said her copy was left on her desk for her to sign.

[24] I doubt that the document I saw is properly described as an 'agreement' and in any event it is not on its face an agreement between CFSL and Ms James as parties. It

opens with the words: 'I….. undertake to observe the following with regard to my employment with … (the Employer).' It was signed by the 'employee', but the document I was given did not contain a space for the employer's signature and nor did CFSL sign the document. The name of 'the Employer' was not filled in either. Triplejump wanted the documents signed because it wanted to protect its proprietary information. Regardless of whether employment agreements had been finalised, the participation of individuals in its training courses meant it considered such protection was necessary. For that reason, and at Triplejump's request, CFSL staff were asked to sign the agreement.

[25] Also during December Ms James was issued with business cards with her name and bearing the Triplejump logo and details. Mr Cooney said the cards were prepared and distributed in that way because it is more economical to order stationery in bulk.

[26] In the same month Ms James and Ms McGregor sent letters to insurers seeking the closure of their agencies to any new business, and the transfer to Triplejump of business submitted but pending completion as at 15 January 2007. The template for these letters, too, was prepared by Triplejump and forwarded to CFSL for completion and sending. The letters began 'I have joined Triplejump'. Ms James sent letters of this kind dated 13 December 2006. Mr Cooney said he saw no problem with the letters because, although entry into the employment relationships had not been finalised, the agencies could be reactivated by a phone call. Work obtained through CFSL's agencies would have to cease anyway. Mr Cooney's focus was on the agencies and he said he was unaware of any significance in the opening sentence.

[27] Mr Cooney's evidence was also that, throughout this time, he had not turned his mind to whether a formal offer of employment would be made to Ms James or to Ms McGregor. During the Christmas break he realised he would need to resolve the matter, but he delayed speaking to Ms James until 19 January 2007.

[28] In the circumstances that delay was very unfortunate. Mr Cooney was dissatisfied with Ms James' failure to provide him with the detailed information he had sought in October, and had concluded in any event that she was unlikely to be

able to generate enough income to justify the creation of an employed position for her. That is why he decided he did not to employ her. He did not perceive any harm at the time in Ms James' attendance at the Triplejump training sessions or in the other actions taken in December. To Ms James, however, these actions continued to reinforce her view that there was a concluded employment relationship.

[29] Her view was further reinforced when she was to be included in CFSL photographs for the Triplejump website.

[30] On 19 January 2007 Mr Cooney finally informed Ms James that no offer of employment would be made to her, and explained why. She regards that action as an unjustified dismissal and has raised a personal grievance accordingly.

Whether there was an employment relationship

[31] Ms Hardaker stated Ms James' position as being:

> (a) at a meeting with David Cooney, on a date between September and October 2006, an employment relationship was agreed between the parties; and
> (b) the parties' conduct and documents provide evidence of the real nature of the relationship and the parties' intentions.

[32] In support Ms Hardaker cited a passage which included the following:

> "In general, agreement is reached by the process of offer and acceptance. … if an intended acceptance is not in accordance with the terms of the offer, the Court may find there is no binding contract. The strict consensus theory has, however, been modified and it is now well settled that an apparent meeting of the minds of the parties will suffice for a binding contract. … Where one party has behaved in such a way that a reasonable bystander would believe that that party is unambiguously assenting to the terms proposed by the other party, the first party is generally precluded from setting up a claim that he or she had some other intention. Consequently, that first party is bound by the contract as if he or she had intended to agree to the other party's terms. …

> The Courts have on occasion been prepared to depart from the traditional offer and acceptance analysis in determining whether a contract has been concluded and have instead looked at the totality of the dealings between the parties to see whether, viewed objectively and as a whole, those dealings show a concluded agreement."[1]

[33] Ms Dawson submitted that CFSL never made an offer of employment to Ms James, rather Mr Cooney declared a willingness to enter into negotiations. The circumstances amounted to an invitation to treat. In support Ms Dawson cited passages including the following:

> "A distinction must be drawn between those declarations which amount to offers, and those which amount only to invitations to treat. It is possible to have a statement which has effect in one context as an offer but in another as a mere invitation to treat. … The critical question is the intention of the declarant, though an apparent intention to contract will override an unexpressed lack of contractual intention."[2]

[34] Ms Dawson also quoted from a decision of the Labour Court (as it then was):

> "The contract [of employment] must have all the incidents of a contract: offer; acceptance; consideration and intention to enter into binding legal relationship.
> … For there to be a contract, it must appear that the parties went beyond mere discussion and, in fact, both intended to enter into a legal binding relationship with each other and on the same terms as each other."[3]

[35] Ms James asserted repeatedly in her evidence, and Ms Hardaker confirmed as set out at [31], that the employment agreement was formed when Mr Cooney asked if she wanted to be part of Triplejump and explained her choice to her, and she advised him of her choice. That process was finalised in or about September or October 2006.

[36] I accept Mr Cooney's evidence to the effect that he was advising Ms James of the implications for her of CFSL's entry into a Triplejump franchise, and seeking from her an expression of interest in becoming an employee of CFSL. He did not intend to and nor did he actually offer employment to Ms James at that time, and nor

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[1] Laws of New Zealand, Contract para 16
[2] Laws of New Zealand, Contract para 18
[3] **Canterbury Hotel etc IUOW v The Elms Motor Lodge Limited** [1989] 1 NZILR 958, 965; (1989) Sel Cas 277, 286

was he in a position to do so as he had not even finalised CFSL's commitment to a Triplejump franchise. There was no suggestion that he would, or did, raise the prospect of changing the arrangement with Ms James for any reason other than the fact that embarking on the franchise would prevent the continuation of the existing arrangement. In that context, I do not accept that Mr Cooney's statements could amount to any more than an invitation to treat and I do not accept they indicate an apparent intention to contract. Any purported acceptance by Ms James was not capable of amounting to more than an indication of her interest.

[37] The nature of my findings regarding whether or not an employment agreement was concluded in September or October means it is not necessary to consider the parties' subsequent conduct in an attempt to ascertain their intentions. In other words, if the argument is that an agreement was reached in September or October then I find unhesitatingly that there was no such common intention at the time and do not need to refer to the parties' subsequent conduct in order to ascertain their intentions.

[38] Had Ms James not interpreted the early exchanges as she did, she might have been more cautious in her assumptions about the implications of subsequent events and been saved some heartache.

[39] The high degree of emphasis on those early exchanges means I have not been asked to consider whether, even if the early exchanges did not amount to a concluded agreement, the totality of the exchanges to January 2007 were sufficient to indicate the parties had concluded an agreement. I would have had some difficulty in doing so because although matters appeared to be moving in that direction, there was not sufficient discussion or negotiation concerning key terms of an employment agreement to warrant such a finding.

[40] For example no remuneration was ever agreed. Mr Cooney did not suggest a figure or package. During and after the 10 October meeting he did no more than discuss with Ms James the performance requirements in the franchise agreement. Ms James' subsequent comment that she would accept 'the minimum' was vague and Mr Cooney did not understand the reference. Nothing in the associated discussion went further than an attempt to explore expectations regarding remuneration, and nothing in

it amounted to an indication of an intention on Mr Cooney's part to provide any particular remuneration package or Ms James' intention to accept it. The remuneration package is such an important part of an employment agreement that the nature of the parties' discussions about it must be given some weight in assessing whether an employment agreement has been reached, even if the detail of the package has not been finalised. Here the level of discussion about it fell short even of identifying any common ground on what it might contain, let alone amounting to an apparent agreement on the matter.

[41] Similarly, there was nothing beyond vague and generalised conversation about other terms fundamental to any employment agreement. There was no negotiation about Ms James' hours and days of work, or entitlements to leave beyond Ms James' general query about what would happen 'if something came up' or if she had exceeded her targets.

[42] Thirdly, although the need for a written employment agreement was discussed, I am not persuaded Mr Cooney indicated that, for example, an agreement was being prepared for Ms James' consideration. The discussion went no further than commenting on the need for a written agreement if an employment relationship was entered into and on what would happen if a written agreement was presented – namely that it would be referred to Ms James' solicitor.

[43] Having said that, I accept that Ms James was included in the changeover process as if she was to have an association with Triplejump. She was invited to the Triplejump training courses, when she should not have been if she was not to be part of the Triplejump franchise as an employee of CFSL. She misunderstood the purpose of the 'confidentiality agreement', which in the circumstances is not surprising, and that in turn reinforced her justified sense of inclusion. The provision of the branded stationery, and Ms James' participation in the photoshoot were relatively minor but should not have happened unless or until Ms James' employment had been confirmed.

[44] More significant is the sending of letters closing agencies to new business and transferring to Triplejump business submitted but pending completion. Such activity

should not have occurred unless an employment agreement had been reached. However whether it means an employment agreement had indeed been reached is a different matter.

[45] I take into account that Triplejump was the initiator or source of the activity in question, and Mr Cooney and CFSL played a relatively passive role in it. I take into account, too, the weakness of the remainder of the evidence bearing more directly on whether employment had been offered and accepted and on the terms of the offer and acceptance. Viewing the circumstances overall, permitting Ms James to participate as she did in December amounted to poor management and an overly dismissive approach to (or failure to consider at all) the implications for Ms James' own business of changes of that kind. Mr Cooney should have acted to confirm whether an offer was to be made to Ms James far sooner than he did, and should not have allowed matters to drift as he did once he began to experience reservations about offering employment to Ms James. I do not go as far as to find a concluded employment agreement underlay that activity.

[46] For these reasons I find the parties did not enter into an employment relationship. Mr Cooney's actions on 19 January 2007 did not, therefore, amount to a dismissal.

Costs

[47] Costs are reserved. The parties are invited to agree on the matter but of they seek a determination from the Authority they shall have 28 days from the date of this determination in which to file and serve memoranda, with a further 7 days from the date of receipt of the relevant memorandum in which to file and serve a reply.

R A Monaghan
Member of the Employment Relations Authority