

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 149
5537981

BETWEEN	E-LIGHTING LIMITED Applicant
A N D	GABRIELLE DICKENS First Respondent
A N D	DAX PETER Second Respondent
A N D	HUNZA PRODUCTION LIMITED Third Respondent

Member of Authority: Eleanor Robinson

Representatives: David Fleming, Counsel for the Applicant
Tim Oldfield, Counsel for the First and Second Respondents
Peter Davey, Counsel for Third Respondent

Investigation Meeting: On the papers

Submissions of the parties 14 May 2015

Date of Determination: 25 May 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] By determination [2015] NZERA Auckland 61 dated 26 February 2015 I granted interim injunction orders in respect of the First Respondent, Ms Gabrielle Dickens, and the Second Respondent, Mr Dax Peter, on the application made by the Applicant, E-Lighting Limited (E-Lighting) in the following terms:

- a. In reliance on the undertakings as to damages lodged by E-Lighting, Ms Dickens and Mr Peter are enjoined from not personally or directly or indirectly:
 - i. engaging in any activity which competes directly or indirectly with E-Lighting by making use of proprietary information belonging to E-

Lighting, including but not limited to information relating to E Lighting's customers or the pricing of products previously distributed by E-Lighting;

ii. making use of proprietary information belonging to E-Lighting including all information contained in the Excel spreadsheet relating to E-Lighting's General Ledger, and including but not limited to information relating to E Lighting's customers or the pricing of products previously distributed by E-Lighting;

iii. buying, selling, or acting as distributors for Hunza Production Limited product lines which were the subject of a distribution agreement, oral or otherwise, between E-Lighting and Hunza Production Limited prior to 31 December 2014, within New Zealand.

b. The term of this order is from the date of this determination for a period of three months, i.e. until 26 May 2015 (unless varied before that date by further order of the Authority or the Employment Court).

[2] The substantive issues in respect of this case have not been resolved to date with further investigation meetings to be held on 12 June and 4 August 2015 to determine liability and penalty claims, with a further date yet to be arranged between the parties to deal solely with the issue of damages.

Issue

[3] The sole issue to be addressed in this determination is whether or not the existing interim injunction should be continued beyond 26 May 2015.

Submissions for the Applicant

[4] E-Lighting claims that it has been wronged in three principal ways:

- i. The First Respondent, Ms Dickens, made sales for her own benefit or that of her company, Limelight Limited, depriving E-Lighting of potential profits. These actions were carried out without Ms Dickens taking appropriate steps to manage any conflicts of interest, and in breach of her duty of fidelity.
- ii. In 2014 Ms Dickens and the Second Respondent, Mr Peter, arranged to go into business together, with the intention of representing suppliers including E-Lighting's key supplier, Hunza Production Limited (Hunza). The actions

of Ms Dickens and Mr Peter precipitated the loss of the Hunza business by E-Lighting, or at least deprived E-Lighting of an opportunity to avert the loss of that business, resulting in substantial loss of profits for E-Lighting.

- iii. Immediately upon their resignations taking effect on 12 January 2015, Ms Dickens and Mr Peter (initially trading as 'Lighting Revolution') were directly competing against E-Lighting, representing brands including Task Lighting Limited and Hunza to previous customers of E-Lighting. This competition was unfair as Ms Dickens and Mr Peter were:
- a. Taking advantage of preparations improperly made while in E-Lighting's employment;
 - b. Making use of confidential information belonging to E-Lighting;
 - c. Leveraging the relationships they had with E-Lighting's suppliers and customers; and
 - d. In breach of a contractual restraint of trade.

[5] E-Lighting further claims that breaches of their employment obligations by Ms Dickens and Mr Peter were aided and/or abetted by Hunza. This included Hunza initially indicating to them that it was looking to take the distributorship rights from E-Lighting, then later ending its distribution arrangement with E-Lighting effective 31 December 2014 and subsequently arranging for it instead to be represented by Ms Dickens and Mr Peter.

[6] E-Lighting is seeking a range of remedies including penalties against Ms Dickens and Mr Peter, and Hunza, in addition to awards of damages against Ms Dickens and against Ms Dickens and Mr Peter jointly and severally.

[7] E-Lighting posits its submissions for continued injunctive relief on the grounds that either that Ms Dickens and/or Mr Peter committed serious breaches of fidelity and should not be allowed to benefit from having done so by being able to compete unfairly against their former employer; and that the employment agreements between E-Lighting and Ms Dickens and Mr Peter can be seen from the factual matrix to have included restraint of trade which were implicitly accepted by Ms Dickens and Mr Peter and to which they should now be held.

Breaches of fidelity

[8] It is submitted that it is well established in law that employees have an implied duty of fidelity pursuant to which they must serve and look to advance the interests of the employer.

[9] Ms Dickens was a trusted employee of E-Lighting and was its sales manager as well as its sales representative. The function of her role was to generate and make sales on behalf of E-Lighting, maximising profits for her employer. It is submitted that in breach of this duty she regularly advanced her own interests at the expense of the employer, including by selling for and on behalf of her own company, Limelight Limited.

[10] It is submitted that the evidence of Ms Dickens is that she had discussions with Mr Andrew Cunningham, CEO of Hunza, and/or Hunza at times up to and including October 2014 in which they talked about issues including:

- (a) The future of the Hunza – E-Lighting relationship;
- (b) Ms Dickens' intention to leave E-Lighting;
- (c) How Limelight could represent Hunza;
- (d) Ms Dickens' views on the conflict between Mr Ross Paden, CEO of E-Lighting, and Mr Cunningham in relation to the LuxR joint venture.

[11] It submitted the Hunza product codes and prices were taken from E-Lighting by Ms Dickens before her resignation took effect, and that within a few days of the resignation date (i) promotional materials and terms of trade were prepared for her own use, (ii) Ms Dickens, Mr Peter and Limelight trading as Lighting Revolution had been named as Hunza's distributors covering the territories of New Zealand and the Pacific, and (iii) Ms Dickens and Mr Peter were active in the marketplace, promoting themselves as a new entity representing Hunza.

[12] It is submitted that while Mr Cunningham's evidence was that this was not an exclusive distributorship arrangement, Ms Dickens and Mr Peter were the only distributors to New Zealand and the Pacific (E-Lighting's previous territory) named on Hunza's website.

[13] Mr Cunningham's evidence at the interim hearing emphasised the importance of having appropriate distribution arrangements in place for his company. It is submitted that it is inconceivable that he would have terminated the arrangement with E-Lighting without first knowing if another suitable representative could be found.

[14] E-Lighting submits that in *Eli Brigade Road Ltd v. Brown & Others*¹ the Court emphasised an employer's right to be given a chance to stabilise its business and reinforce relationships, the obligation of employees was to give their employers that chance, and the significance of the loss of that chance.

¹ CIV-2001-409-00733 (High Court, Christchurch, 5 August 2004, Fogarty J)

[15] In this case, it is submitted that as in *Eli Brigade Road* that key clients may have been lost to the employer even if Ms Dickens and Mr Peter had not left their employment taking those clients with them. However, the Court held that employers are entitled to be given an opportunity to repair relationships with clients and that if employees wrongly deprive the employer of that opportunity, they will be liable for such losses as do in fact arise.

[16] It is further submitted that employees who become aware that a commercial relationship could be at risk are not just obligated to refrain from taking advantage of the situation for themselves. They have a positive obligation to bring the situation to the notice of their employer².

[17] The duty of fidelity continues to apply during the employee's notice period, including any period of garden leave, as well as while the employment is on an ordinary footing. It makes no difference if the ending of the employment relationship is contemplated³.

[18] Whether or not the information would be considered truly confidential, a departing employee cannot lawfully take with them information such as customer or client lists for the purpose of using them in a competing role.

[19] Preparations for life after the ending of an employment relationship are not necessarily inconsistent with a duty of fidelity, but preparations to go into business in ways that would be contrary to the interests of the current employer are⁴.

[20] In *Rooney Earthmoving Ltd v. McTague*⁵ the defendants were found to have acted in breach of core employment obligations by acting in concert to secure clients for their new venture while still in employment, and by undertaking other proprietary steps to go into competition such as soliciting other staff to join with them.

[21] Ms Dickens and Mr Peter made a number of people outside E-Lighting aware of their intended resignations and that when asked to keep their plans confidential by Mr Peden, CEO of E-Lighting, they had responded that a number of people were already aware that they had resigned.

[22] The resignation of Ms Dickens and Mr Peter was cited by Mr Cunningham as an immediate reason for his terminating of the Hunza/E-Lighting distribution agreement. This was done while Ms Dickens and Mr Peter remained E-Lighting's employees.

² *BDM Grange Ltd v. Parker & Others*, CIV-2005-404-993, High Court, Auckland, Priestly J, at para.[58]

³ *Peninsula Real Estate Ltd v. Harris*, CP 291/91, High Court, Christchurch, 6 September 1991, Tipping J, "Shilling", at p.266

⁴ *Space Industries (1979) Ltd v. McKavanagh* [2000] 1 ERNZ 490, at p.503

⁵ [2009] ERNZ 240

[23] It is well established that breaches of fidelity may justify the imposition of a post-employment restraint, even when non-existing in contract⁶.

[24] The actions of Ms Dickens and Mr Peter do not need to be the sole cause of E-Lighting's loss for remedies to be awarded.

Restraint of trade

[25] It is submitted that E-Lighting believed that written employment agreements had been formalised with both Mr Peter and Ms Dickens. Whilst accepting that E-Lighting cannot prove the existence of countersigned agreements, there is no doubt that employment relationships existed, and therefore that employment agreements of some form were created. This, therefore, gives rise to the question of what the true terms of employment were.

[26] Ms Dickens put before the Authority two copies of a proposed agreement that had been signed by Mr Peden that had been retained by her without countersigning them. That document based upon a template E-Lighting agreement, expressed with E-Lighting believed the terms of employment to be. It is also materially the same as the agreements that previously applied between Mr Peden's earlier company, Lighting Pacific Limited, and both Ms Dickens and Mr Peter. Ms Dickens said she had received this document after her employment had commenced, however, there was a later change in her role, and she accepted the benefits of that change after having received the document.

[27] Mr Peter claimed that he was not given a copy of the template agreement. However, neither he nor Ms Dickens disputed or disavowed the terms of the template agreement. It submitted that both Mr Peter and Ms Dickens appeared to comply with the terms of the template employment agreement, even as late as when resigning employment, giving the required one month's notice.

[28] If Ms Dickens and Mr Peter were given copies of the agreement, they did not agree to its terms. It submitted there would be a clear duty of good faith for them to actively express that disagreement. It would not be open to them to maintain their silence, allow E-Lighting to believe they had agreed to the terms, accept the benefits conferred under the agreement, and then later claim they are not bound by them⁷.

[29] If the terms of employment are not contained within the template E-Lighting employment agreement, it necessarily follows that the actual terms were largely implied ones.

⁶ *Peninsula Real Estate* (supra)

⁷ *Marine Helicopters v. Stephenson* [1996] 1 ERNZ 472

[30] It is submitted that there is common ground that there was little discussion about the terms of employment when either Mr Peter or Ms Dickens were employed by E-Lighting, and that few issues other than role, salary and use of company vehicles were specified. The employment relationships between E-Lighting, Mr Peter and Ms Dickens arose against the history that each of the two employers had previously worked for Mr Peden. This was done under a previous company, but the employees were in similar roles, working in the same industry, and even representing the same major supplier, Hunza.

[31] It is submitted that there is no basis for inferring that the implied terms in the new employment agreements would be anything other than the terms that previously applied.

[32] For sales representatives in such a context, a restraint of trade would be normal. It is notable that the Limelight template employment agreement supplied to the Authority itself contains a restraint of trade raised in similar terms to that contained in the E-Lighting template agreement, as did the later draft.

[33] The scope and six months duration of the claimed restraint of trade clauses were not unreasonable. A nationwide non-compete restraint of trade of that duration was upheld by the Employment Court in *Credit Consultants Debt Services NZ Ltd v. Wilson (No 3)*⁸.

[34] It is submitted that whilst it is accepted that Courts will generally be reluctant to infer the existence of a restraint of trade, these may be implied through the words and actions of the parties. However, this is not a situation where there were some written terms and the Authority has been invited to imply a restraint as an additional term.

[35] If it is true that there was no written documentation and no real discussion of terms of employment when they were each engaged as per the evidence of Mr Peter and Ms Dickens, therefore almost all terms of employment need to be inferred from the words and the conduct of the parties.

[36] The most logical inference in this case is that except as expressly agreed to the contrary, the employment agreements created when Ms Dickens and Mr Peter commenced work at E-Lighting contain the same terms as had previously applied at Lighting Pacific. It is noted that Mr Peter admitted under cross examination that this was his understanding. Further evidence has been given on the part of Ms Dickens that at the time she sought employment with E-Lighting there was very little discussion about terms of employment.

⁸ [2007] ERNZ 252

[37] It is submitted that this is because the terms that would apply were understood given the previous relationship between the parties, and neither party felt the need to go through item by item the terms under which they had previously worked.

Continued injunctions

[38] It is noted that in its interim determination, the Authority imposed orders restraining Ms Dickens and Mr Peter from specified activities. The orders were granted on the basis there was an arguable case that Ms Dickens and Mr Peter had breached their duties of fidelity and duties in relation to confidentiality. In accordance with the so-called “springboard” injunctive remedies were potentially available to E-Lighting independently of any contractual restraint.

[39] The interim orders were expressed to apply until 26 May 2015 unless varied before that date by further order of the Authority or the Employment Court. 26 May 2015 was a sufficient time to allow the matter to be brought back to the Authority before the expiry of the interim orders, however, that is well short of the time E-Lighting considers reasonably necessary to enable it to withstand unrestrained competition from its former representatives and supplier, and to provide Ms Dickens and Mr Peter from gaining a springboard effect from having left E-Lighting’s employment, taking with them its key supplier.

[40] It is well established law that permanent injunctive relief will be appropriate where failure to grant the injunction would be likely to result in loss of ongoing business relationships for an aggrieved party. While the Hunza relationship has irretrievably broken down, E-Lighting still has valuable customer relationships which it is eager to protect as best it can.

[41] To date, E-Lighting has been able to cut costs and stabilise its business so it is not trading at a loss, and despite the impediment to Mr Peden still being in recovery from his back surgery, E-Lighting is in the process of arranging to bring a new range of products to market. However, it is not yet in a position to launch those new products, and until it is in that position, it would be reckless for it to increase operating costs by employing new sales representatives.

[42] Rebuilding the business to the degree where it could compete on a level playing field with Ms Dickens and Mr Peter (should they be able to represent Hunza), will take considerable further time.

[43] However, it is accepted that there is a balancing required between protecting the interests of a wronged employer and allowing people to earn. A six month restraint of trade is

well within the normal range for employees who held key external relationships. While Ms Dickens and Mr Peter have argued that the present injunctions have caused hardship to them, given their limited scope, the injunctions could only have caused hardship if Ms Dickens and Mr Peter had been relying on obtaining Hunza's New Zealand business when they left E-Lighting's employment. Such reliance would point strongly towards them having breached their duties towards E-Lighting by having discussions about this with Hunza.

[44] It is well established in law that injunctions may be granted to prevent former employees benefiting from arrangements that were made wrongfully prior to the termination of their previous employment. Whether this is argued in terms of unlawful conspiracy through the High Court, or in terms of breaches of fidelity through the employment jurisdiction, the substantive outcome is the same – employees should not be allowed to benefit from their own malfeasance, and should not be allowed to compete unfairly against their former employer as a result of such malfeasance.

[45] It is submitted that a total restraint period of six months from termination of employment is reasonable.

Submissions of the First and Second Respondents

[46] Ms Dickens and Mr Peter submit that while this matter is still at the interim injunction stage, the Authority may take evidence it has heard in the investigation to date into account consistent with its broad powers under s.160 of the Employment Relations Act 2000 (the Act).

Confidential information

[47] Ms Dickens and Mr Peter submit that the allegations that they misused confidential or proprietary information are not established. It is submitted that there is no allegation that Mr Peter misused confidential or proprietary information. In respect of Ms Dickens, she is alleged to have:

- (a) Misused the general ledger;
- (b) Misused the Hunza price list; and
- (c) Misused the LuxR price list.

[48] In respect of the general ledger, Ms Dickens and Mr Peter submit that there is no evidence that Ms Dickens actually took or used any confidential information, being financial information, on the general ledger. It is submitted that there is an innocent explanation for Ms Dickens having sent a list of general ledger codes to her partner, Mr Alistair Peace, and

that there was an innocent explanation for this completely unrelated to any later competition with E-Lighting.

[49] In respect of the Hunza price list, E-Lighting has adduced evidence from one customer, Mr Mike Renwick, who said he received the price list from Ms Dickens. He also accepted that he had obtained a price list from E-Lighting in the past by simply asking for it. The price list must be presented to customers, and it cannot be confidential information because it is presented to customers. It is not information that is confidential to the business.

[50] The same submissions apply in respect of the LuxR price list, except there is no evidence that the LuxR price list was used in any way. Indeed it is hard to see how it could be used as E-Lighting retains the LuxR agency.

[51] It is submitted that E-Lighting must show that Ms Dickens and Mr Peter actually used the confidential information to establish a claim; it is insufficient simply to establish removal of confidential information to justify a springboard injunction. It is also necessary to establish use as mere possession of confidential information will not create a head start and can be addressed simply by an order for delivery up and a normal confidential information injunction⁹.

[52] Ms Dickens has given undertakings she would not use any of the information and there is no suggestion that those undertakings have been breached. There is no allegation that other confidential information has been used, particularly customer information. E-Lighting has had Ms Dickens' computer forensically examined and there is no evidence that any other allegedly confidential information other than that referred to above, being the general ledger, Hunza price list and LuxR price list, was taken away, let alone used.

[53] Ms Dickens and Mr Peter submit that there is no arguable case that they misused confidential information now that further evidence has been heard on the matter. They have not gained any head start by misusing confidential information.

[54] In terms of the balance of convenience and overall justice, there is no suggestion Ms Dickens has breached her undertakings and Ms Dickens and Mr Peter submit that there is really no viable claim that they misused confidential information.

Hunza

[55] Ms Dickens and Mr Peter submit that the reasons Mr Peden has given for extending the injunction are sparse.

⁹ *SG&R Valuation Service Co v. Boudrais & Ors* [2008] DWHC 1340 QB

[56] Ms Dickens and Mr Peter submit the extended injunction is sought not to prevent any head start, but to prevent lawful competition. That is not the point of a springboard injunction. Any head start that they may have allegedly gained has dissipated. It has been four months since their departure from E-Lighting when E-Lighting alleges the head start they built up lasted three months (October 2014 to January 2015).

[57] The point of a springboard injunction is not to punish the alleged wrongdoer, but to prevent an illegitimate competitive advantage. There is no such competitive advantage, particularly because the relationship between E-Lighting and Hunza is irreparable. That business opportunity has gone. The Limelight Design Limited business has also been sold.

[58] A key reason for granting the interim injunction referred to at para.[82] of [2015] NZERA Auckland 61 was that E-Lighting sought “*a reasonable time in which to recruit and train a new sales employee and to rebuild his client relationships and business*”.

[59] This is referred to again at para.[100] of the Authority’s earlier determination where it refers to:

A time reasonable to allow Mr Peden to recruit and train a replacement to the required technical standard.

[60] Mr Peden confirmed to the Authority that he is not looking to recruit and train a new sales employee at the moment. An extension is therefore unnecessary.

[61] The Authority was also prepared to accept, when granting the interim injunction, that there was a possibility that E-Lighting and Hunza could repair their business relationship where, at para.[86] of [2015] NZERA Auckland 61 it was stated:

On this basis, there would appear on the untested affidavit evidence to be some indication however slight, that E-Lighting might be able to rebuild a commercial relationship with Hunza.

[62] Ms Dickens and Mr Peter submit that is not going to happen. Mr Peden himself had said in his evidence that “*there is no prospect of that relationship being restored*”.

[63] It is submitted that the alleged misuse of confidential information also played a significant part of the Authority’s reason for granting the interim injunction, but Ms Dickens and Mr Peter submit this issue has not been made out and there was no head start gain.

[64] Mr Peden’s evidence was that whilst E-Lighting had suffered a loss it was now stable and breaking even and that “*currently customers are remaining loyal*”. The situation is

different from what E-Lighting contended it was at the time the interim injunction was granted. Even though E-Lighting is still only selling LuxR and Valente products and has not regained the Hunza distributorship, and even though Hunza products are still being sold through persons other than Ms Dickens and Mr Peter, E-Lighting says its business is stable and customers are loyal. Ms Dickens and Mr Peter submit that E-Lighting's fears have not been made out and the interim injunction should not be extended.

[65] It is submitted that it is worth noting that Hunza products are still being sold through persons other than Ms Dickens and Mr Peter and, contrary to E-Lighting's view that the Hunza brand is inextricably linked to 'Ms Dickens' and Mr Peter's faces', customers are still purchasing Hunza product regardless of who is selling it. It is the product rather than the seller they are linked to. Mr Renwick confirmed that he continued to purchase Hunza products after the interim injunction was granted even though he could not purchase it from Ms Dickens and Mr Peter.

[66] Ms Dickens and Mr Peter submit it would be completely inappropriate to extend the interim injunction. The nature and length of the springboard injunction needs to be fair and just in all the circumstances and it would simply be unjust to extend the injunction against two modestly paid, non-fiduciary employees, particularly when the original stated reasons why the injunction was sought no longer exist. An extension would go beyond preventing a head start to preventing lawful competition.

[67] Ms Dickens and Mr Peter submit the interim injunction should not be extended and should be rescinded.

Submissions of the Third Respondent

[68] It is submitted that the interim injunction is not based on a contractual restraint of trade.

[69] It has been accepted that the relationship between E-Lighting and Hunza is now at an end.

[70] The interim injunction was granted partly in order to allow E-Lighting to hire new employees, and it is submitted that it is extraordinary it has not done so and indeed has not advertised for new employees. There is therefore no reason to extend the interim injunction on that basis if the indulgence granted earlier had not been used.

[71] It is submitted that Hunza should not be restrained from dealing with whosoever it wants to deal with beyond 26 May 2015.

Determination

[72] The purpose for the interim injunction was to protect E-Lighting's legitimate proprietary interest whilst providing Ms Dickens and Mr Peter with sufficient opportunity to use their skills and experience in the lighting industry to earn a living until I was able to determine the substantive matters.

[73] That determination contained orders covering the period until 26 May 2015, a period of some 4.5 months since the effective date of the termination of Ms Dickens and Mr Peter's employment with E-Lighting.

[74] In making the orders of injunction relief in favour of E-Lighting, I had taken into consideration the following factors:

- The use by Ms Dickens and Mr Peter of confidential information obtained in the course of their employment with E-Lighting to in effect 'spring-board' their business Limelight Ltd;
- The time needed by Mr Peden to recruit and train a new sales employee; and
- The possibility that without the intervention of Ms Dickens and Mr Peter, its former sales employees, E-Lighting might have been able to rebuild its previous commercial distributorship relationship with Hunza,

[75] Dealing with each factor in turn, I make the following observations:

Confidential information

[76] E-Lighting seeks an extension of the interim injunction on the basis that Ms Dickens took confidential information during the course of her employment with E-Lighting with the intention of her and Mr Peter using it in a competing role, and thereby gaining a commercial advantage in setting up and operating a competing business to that of E-Lighting..

[77] I accept that the submission of the First and Second Respondents that customers can obtain a Hunza price list from distributors; that it is the basis of business with such customers, and that this was confirmed by the evidence of Mr Renwick. In regard to the LuxR price list, I accept as relevant the submission that E-Lighting has retained the LuxR agency.

[78] In regard to the general ledger information down-loaded by Ms Dickens during the course of her employment with E-Lighting, and indeed the misuse of confidential information

obtained during the course of Ms Dickens' employment with E-Lighting this issue has yet to be determined as regards liability.

[79] However, whilst the misuse of confidential information and the associated liability claim have yet to be determined, I accept that any benefit obtained by having confidential information now some 4-5 months 'old' is unlikely to assist in any further 'spring boarding' of a business operated by Ms Dickens and Mr Peter.

Recruitment and Training of a sales employee

[80] I accept that Mr Peden's time has been largely occupied during the period of the interim injunction with cutting costs and stabilising the E-Lighting business, and in arranging to bring a new product to market. This has been a necessary and productive use of his time.

[81] However whilst this focus is understandable, an important part of the reason for granting the interim injunctive relief was based on the time involved for the recruitment and training of replacement sales personnel in place of Ms Dickens and Mr Peter.

[82] This has not occurred during the period of the interim injunction, and Mr Peden's evidence is that no steps have yet been taken to advertise such positions.

[83] On that basis, I find that I am not convinced that extending the interim injunction until the conclusion of a six month period from 12 January 2015 for the purpose of recruiting and training a new sales employee would be justified.

Distributorship with Hunza

[84] Since the date of the interim injunction determination on 26 February 2015, it has been accepted by all parties that there is no possibility of E-Lighting rebuilding a distributorship relationship with Hunza. Consequently that reason can no longer operate as a reason for continuing the interim injunction.

[85] I further take into account in determining this issue that as employees Ms Dickens and Mr Peter were remunerated at a modest level and had no fiduciary duties in respect of E-Lighting.

[86] Their positions as sales employees and the alleged breach of their implied duties of fidelity to E-Lighting I hold to have justified the imposition of an interim injunction until 26 May 2015, in order to allow E-Lighting time and the opportunity to stabilise its business and reinforce relationship with its customers.

[87] However I find that the original basis for granting such injunctive relief to be diminished since the date of issuing the determination.

[88] Accordingly I determine that the interim injunction will not be extended beyond 16 May 2015.

Next Steps

[89] My decision not to extend the interim injunction is not to be held to imply a finding as to the alleged breaches of their employment obligations by Ms Dickens and Mr Peter, or of the alleged claim that Hunza aided and abetted such claims. Accordingly, the investigation meeting into the substantive liability claims will resume on 12 June 2015.

Costs

[90] Costs are reserved.

Eleanor Robinson
Member of the Employment Relations Authority