

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2015] NZERA Auckland 61  
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 Respondents

Investigation Meeting: 13 February 2015 at Auckland

Submissions of the parties 13, 16 & 17 February 2015 from  
Applicant  
13 & 17 February 2015

Date of Determination: 26 February 2015

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] In a Statement of Problem filed in the Authority on 21 January 2015, the applicant, E-Lighting Limited (E-Lighting), sought an interim injunction in addition to a number of other orders against Ms Gabrielle Dickens and Mr Dax Peter, former employees.

[2] The application for an interim injunction was accompanied by an undertaking as to damages and affidavits in support of the application by Mr Ross Peden, director of E-Lighting and Mr Glenn Foster, director of Foster & Co Chartered Accountants which acted as the tax accountant to E-Lighting.

[3] This determination addresses the application for an interim injunction, and the substantive matters which include alleged breaches of the duty of fidelity owed by

Ms Dickens and Mr Peter to E-Lighting, alleged breaches of the terms of their employment agreements with E-Lighting, and penalty claims, will be investigated by the Authority at a later date yet to be scheduled.

### **Background facts**

[4] E-Lighting is a small company in the business of selling lighting products, particularly outdoor lighting. Until the end of 2014, E-Lighting was a distributor for Hunza Production Limited (Hunza) and LuxR, a company associated with Hunza, and also imported and sold Valente products, which it continues to do.

[5] E-Lighting was represented in the market by two sales representatives: Ms Dickens and Mr Peter.

[6] E-Lighting employed Mr Peter in April 2011. Mr Peter had previously worked for Mr Peden in two other businesses, one of which was Lighting Pacific, prior to his employment at E-Lighting.

[7] E-Lighting employed Ms Dickens in July 2012. Ms Dickens had also previously worked for Mr Peden at Lighting Pacific.

[8] Mr Peter was employed as Business Development Representative and his territory covered Northland to the Bay of Plenty including Taupo and Rotorua. Ms Dickens commenced employment as Production Manager LuxR and Sales Engineer E-Lighting, and from April 2013 she became a sales representative in which capacity her territory included Wellington, Taranaki, Wairarapa and the South Island.

[9] Mr Peden in untested affidavit evidence stated that Mr Peter and Ms Dickens were provided with individual employment agreements which contained a six month restraint of trade clause. The clause read:

*In order to protect the business secrets of the employer and so as not to unfairly compete with the employer, you agree that you shall not, for a period of six months following the conclusion of your employment with the employer, engage in any activity or be concerned in any capacity either on your own account or as a consultant, shareholder or partner with, or as an employee of, any other person, firm or company in any business within a 100km radius of the employer's premises which competes, either directly or indirectly, with or is similar to the business of the employer.*

[10] Mr Peden stated that he believed the individual employment agreements had been accepted by Mr Peter and Ms Dickens, and neither had raised any issue about the restraint of trade clause.

[11] Moreover both Mr Peter and Ms Dickens had been subject to individual employment agreements containing similar restraint of trade clauses in the companies in which they had previously worked for him.

[12] Mr Peter in his untested affidavit evidence stated that he did not recall being presented with, or signing, an individual employment agreement with E-Lighting. Ms Dickens in her untested affidavit evidence stated that she had not signed the individual employment agreement with which she had been provided as she did not want a restraint of trade, and she had informed Mr Peden of this.

[13] Ms Dickens had worked for Mr Peden for more than five years in total through two different companies and in his untested affidavit evidence, Mr Peden said it had been his intention to offer Ms Dickens shares in the E-Lighting business, and this had been discussed with both her and Mr Foster.

#### *Limelight Design Limited*

[14] In her untested affidavit evidence, Ms Dickens said that throughout the course of her employment with E-Lighting she had operated a lighting business called Limelight Design Limited (Limelight), with Mr Peden's knowledge, and that E-Lighting had commercial dealings with Limelight during the currency of the parties' employment relationships.

[15] Ms Dickens states whilst the first task of Limelight was labour for LuxR by assembling parts, the core purpose of Limelight was lighting design and supply and this was put into effect shortly thereafter.

[16] Mr Peden stated in his untested affidavit evidence that he had agreed to sub-contract to Ms Dickens's mother to assemble LuxR components, the invoices for which service being identified as submitted by Limelight.

[17] Subsequently Ms Dickens had asked if Limelight could sell E-Lighting products and he had agreed that she could purchase the E-Lighting products at wholesale prices provided there was no conflict of interest, the leads were generated outside of E-Lighting, and did not include E-Lighting customers or suppliers.

[18] Mr Peden stated that he had not been aware of the extent of Limelight's activities during Ms Dickens's employment, and would not have tolerated Limelight competing against

E-Lighting. His understanding had been that its activities would be largely complementary to those of E-Lighting, being more in the nature of a wholesale customer than a competitor.

[19] Ms Dickens's untested affidavit evidence is that she and Mr Peter agreed in October 2014 that they would both leave E-Lighting and work together at Limelight, with Mr Peter effectively being Ms Dickens's employee.

#### *Hunza*

[20] Mr Peden stated in his untested affidavit evidence that Hunza was the most important of E-Lighting's three suppliers, with almost half of E-Lighting's revenue related to the Hunza product line which was particularly profitable.

[21] In addition, LuxR was an associated business to Hunza, making the relationship even more critical to the E-Lighting business.

[22] Mr Andrew Cunningham, Managing Director of Hunza, stated in untested affidavit evidence that Hunza had made a decision to terminate supply to E-Lighting with effect from 31 December 2014 based on a range of factors, including a poor payment history and unsatisfactory commercial relationship issues.

[23] Mr Foster in his untested affidavit evidence disputes that E-Lighting was not in a sound financial position and states that Mr Cunningham had commented on 3 and 16 October, and 17 December 2014 that E-Lighting was a good distributor, and had given him the impression that E-Lighting was to continue as the sole distributor of Hunza products in New Zealand and the Pacific.

[24] Mr Cunningham states that he had discussions about the possibility of Limelight becoming a New Zealand distributor for Hunza in January 2015.

#### *Task Lighting*

[25] Task Lighting Limited (Task Lighting) is a lighting supplier focussing on LED lighting products. Mr Anthony Townshend, Director of Task Lighting, said that Ms Dickens had purchased product from Task Lighting through Limelight.

[26] Mr Townsend stated in his untested affidavit evidence that during Ms Dickens's employment at E-Lighting he had discussed opportunities with her for Task Lighting to create a purchasing alliance with E-Lighting, particularly in regard to Harvard product supplies. He stated that Ms Dickens had informed him that Mr Peden had not been interested in creating such an alliance unless he could represent the Harvard product exclusively, and the purchasing alliance with E-Lighting did not therefore eventuate.

[27] Mr Townshend stated that in early 2014 he had produced a proposal for Ms Dickens to present to Mr Peden. The proposal was that Ms Dickens represent Task Lighting product in the South Island with her costs being split between the two businesses, on the basis that E-Lighting paid her salary for 4 days a week and Task Lighting funded her salary on a 1 day a week basis.

[28] Ms Dickens had subsequently informed him that Mr Peden did not wish to proceed unless the Task Lighting product was to be purchased through E-Lighting for the whole of New Zealand.

[29] Mr Peden stated in his untested affidavit evidence that in early 2014 Ms Dickens had approached him in regard to her being allowed to sell Task Lighting products on commission when calling on E-Lighting customers.

[30] Mr Peden stated that Task Lighting have a range which competes with E-Lighting product in the outdoor lighting and LED lighting segments. He had advised Ms Dickens that it would not be appropriate for her to represent Task Lighting as if it needed representation, E-Lighting would represent them and receive a commission on sales.

[31] Ms Dickens stated in her untested affidavit evidence that on or about October 2014 she had spoken to Mr Townshend in regard to his interest in Limelight representing Task Lighting in 2015.

[32] Mr Townsend stated that when he had learnt Ms Dickens had resigned from E-Lighting, they had agreed that Limelight could represent Task Lighting in 2015.

#### *Resignation December 2014*

[33] On 8 December 2014, Ms Dickens and Mr Peter advised Mr Peden that they intended to launch a new business venture. Mr Peden stated that they had advised him that they wanted to leave and become commission agents representing Task Lighting and E-Lighting, but had not indicated that they intended to resign imminently.

[34] On 9 December 2014, Ms Dickens and Mr Peter gave written notice of the resignation of their employment. Mr Peden stated that before he had seen the written resignations, Ms Dickens and Mr Peter had visited the HUNZA premises and informed several Hunza employees that they had resigned and were starting their own business.

[35] Mr Peden said that when he had discovered this, he had reminded them of the duties set out in the Employment Agreements and asked them to sign a Confidentiality Agreement, which they had done.

[36] At the time of Ms Dickens and Mr Peter's resignations, Mr Peden was awaiting an operation in connection with an extremely debilitating injury which he sustained in August 2014.

[37] On 9 December 2014 Mr Peden emailed Ms Dickens and Mr Peter stating:

*Whilst we are working through the details of trading arrangements (and whilst gab and Dax are still employees of E-Lighting) it is important that we do not discuss any changes to the business outside of the office or immediate family.*

*Dax and Gab, as much as you are excited and looking forward to your new venture, I would ask you guys to refrain from discussing your plans for Limelight with customer and potential suppliers until we agree on a mutually agreeable time to go to the market with the changes.*

*As you can imagine, if the wrong people found out about this it could cause me serious damage and like me, I'm sure you would not want this to happen.*

*I am looking to you to respect this request at such a sensitive time.*

[38] Ms Dickens responded:

*There are a number of people that already know, and I understand that Task Lighting who are on board for the new year are keen to promote that they have some representation for 2015.*

*I'll ask if they have already started this, and ask if this can be held off.*

*As for discussing this with anyone further I'll hold off, and we'll talk about it when we meet.*

[39] On 19 December 2014, Hunza gave Mr Peden notice that it intended to terminate its supply arrangement with E-Lighting.

[40] Mr Peden attempted to dissuade Ms Dickens and Mr Peter from resigning at that time and also attempted to dissuade Hunza from terminating its supply arrangement at that time. However, the attempts were unsuccessful and Ms Dickens's and Mr Peter's employment with E-Lighting terminated with effect from 12 January 2015.

[41] E-Lighting now claims that Ms Dickens and Mr Peter have approached customers of E-Lighting, announcing that they now represent Hunza as well as another supplier, Task Lighting, and seeking to solicit their custom. E-Lighting alleges that Ms Dickens and Mr Peter have committed multiple and serious breaches of the implied duty of fidelity and the duty of good faith while in its employment. Such breaches have included:

- (a) Acting in conspiracy to develop a new business venture that would compete directly with E-Lighting;
- (b) Having business discussions with Hunza which was for their own advantage and extremely detrimental to the interests of E-Lighting;
- (c) Developing a business relationship with a third party, Task Lighting, for their own advantage, and not discussing this opportunity with E-Lighting; and
- (d) Undertaking proprietary steps so that they could go into business targeting E-Lighting's customers within days of ending their employment, and misusing E-Lighting's confidential company information.

[42] E-Lighting claims that Ms Dickens' and Mr Peter's actions since the ending of their employment:

- (a) Are in direct breach of the restraints of trade to which they were subject;
- (b) Involve the misuse of, and taking inappropriate advantage of, the confidential information they had access to as employees of E-Lighting; and
- (c) Built upon the employment relationships they formed whilst in the employment of E-Lighting, and the head start they gave themselves while in E-Lighting's employment.

[43] Interim injunctive relief orders sought by E-Lighting against Ms Dickens and Mr Peter until 12 July 2015 or until the Authority issues its substantive determination are orders:

- (i) Preventing Ms Dickens and Mr Peter from engaging in any activity which competes directly or indirectly with E-Lighting within a 100 km radius of 150E Harris Road East Tamaki;
- (ii) Being concerned in any company or business which is located within a 100 km radius of 150E Harris Road East Tamaki, and which competes directly or indirectly with E-Lighting Limited; or

- (iii) Making use of proprietary information belonging to E-Lighting included but not limited to information relating to E Lighting's customers or the pricing of products previously distributed by E-Lighting; or
- (iv) Selling, or acting as distributors for Hunza products within New Zealand;
- (v) Selling or acting as distributors for Task Lighting products within New Zealand

**Interim injunction application: investigation**

[44] I granted E-Lighting's application for this matter to be dealt with on an urgent basis because this is the usual procedure for dealing with an application for an interim injunction and because of the level of losses E-Lighting said it could incur due to the alleged breaches by Ms Dickens and Mr Peter.

[45] Given the urgent nature of the claim, the matter was directed to urgent mediation on 23 January 2015, but the matter did not resolve at mediation. A case management conference was held by telephone on 28 January 2015 when the Authority heard from counsel for the parties to schedule an investigation meeting date and the lodging of documents, including further affidavits from E-Lighting, Ms Julie Peden, shareholder of E-Lighting, and Mr Foster, and affidavits in opposition by Ms Dickens, Mr Peter, Mr Andrew Cunningham, Managing Director of Hunza, and Mr Anthony Townshend, director of Task Lighting.

[46] At the Investigation Meeting on 13 February 2015, I heard submissions from counsel in relation to the interim injunction application and tested these by questioning how the available evidence related to the relevant principles for determining an interim injunction application. Those principles fall to be addressed by the answers to the following questions:

- (a) Is there an arguable case that E-Lighting will succeed at the Authority's substantive investigation in establishing that Ms Dickens and Mr Peter have breached and are continuing to breach their duty of fidelity to E-Lighting and the terms of their employment agreements binding upon them and that the non-solicitation clause in those agreements is reasonable and enforceable against them;
- (b) If not, where does the balance of convenience lie between the parties, this question to encompass the associated question of whether there is an adequate alternative remedy available to E-Lighting, specifically an award of damages

to be paid by Ms Dickens and Mr Peter, such that an interim injunction is not necessary at this stage; and

- (c) Where does the overall justice of the case lie requiring that an interim injunction be granted?

[47] I have relied on the submission of counsel and on the, as yet untested, evidence in the affidavits which have been lodged by the parties in answering these questions. Consequently, the conclusions which have been drawn are tentative and not necessarily what will be decided at the substantive investigation after full examination of all the evidence which will then be available has been undertaken.

[48] Pursuant to s.162 of the Act, the Authority has power to grant an interim injunction regarding the restraint of trade or a non-solicitation clause, being an order that the High Court or the District Court may make under particular enactments and rules of law<sup>1</sup>.

## **Determination**

### **Is there an arguable case?**

#### *Conspiracy*

[49] Conspiracy is a tortious concept and as such I find that, pursuant to s 161 (1)(r) of the Act, it is outside my jurisdiction.

[50] However I find that both Ms Dickens and Mr Peter took steps in the furtherance of their joint business venture which have implications for their implied duties as addressed below.

#### *Restraint of Trade*

[51] In this case there are no copies of the individual employment agreements between E-Lighting and Mr Peter and Ms Dickens which are signed by Mr Peter and Ms Dickens.. Mr Peden states in untested affidavit evidence that he provided both Mr Peter and Ms Dickens with individual employment agreements signed by him on behalf of E-Lighting, and submits copies of the individual employment agreements provided and a screenshot spreadsheet in evidence as support.

[52] Mr Peter states in his untested affidavit evidence that he does not recall being provided with an individual employment agreement or signing it, and Ms Dickens states in her untested affidavit evidence that although she did receive two copies of an individual

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<sup>1</sup> *Credit Consultants Debt Services NZ Ltd v Wilson (No 2)* [2007] ERNZ 305

employment agreement signed by Mr Peden, she did not sign the individual employment agreement provided to her because she did not agree to the restraint of trade clause.

[53] Ms Dickens further states that she was not provided with the individual employment agreement until some six weeks following her date of commencement of employment, and that she received no additional remuneration in respect of it.

[54] It has not been disputed by Mr Peter or Ms Dickens that they were previously employed in a company operated by Mr Peden and supplied with and signed individual employment agreements which contained a similar restraint of trade clause.

[55] Although Ms Dickens states that she did not agree with the restraint of trade clause, there is no documentary evidence to support her having raised the issue with Mr Peden.

[56] The original individual employment agreement signed by Mr Peden and provided to Ms Dickens was produced at the Investigation Meeting. It had not been signed by Ms Dickens.

[57] I find that Ms Dickens was supplied with an individual employment agreement and it is more likely than not that an individual employment agreement was provided to Mr Peter and that both agreements contained the restraint of trade clauses. However there is no evidence that they were signed by Ms Dickens and Mr Peter as required by s 64 (6) of the Act which states:

*To avoid doubt, an intended agreement must not be treated as the employee's employment agreement if the employee has not—*

*(a) signed the intended agreement; or*

*(b) agreed to any of the terms and conditions specified in the intended agreement.*

#### *Breach of fidelity and good faith*

[58] Of more persuasion is the argument that Ms Dickens and Mr Peter are in breach of their implied duties as employees. As a result of entering into an employment relationship, employers and employees owe each other certain duties and obligations. At the core of the employment relationship and contract of service is the good faith requirement imposed on employers and employees by s.4 of the Act and the implied relationship of trust and

confidence between them. In *Telecom South Ltd v Post Office Union (inc)*<sup>2</sup> Justice Richardson said:<sup>3</sup>

*The contract of employment cannot be equated with an ordinary commercial contract. It is a special relationship under which workers and employers have mutual obligations of confidence, trust and fair dealing.*

[59] The duty of good faith in s 4 of the Act requires employers and employees to deal with each other in good faith, and not to:<sup>4</sup> “*whether directly or indirectly, do anything ... to mislead or deceive each other*”.

[60] In addition employers have implied duties which include providing the employee with agreed salary and other benefits, providing a safe work place, and treating the employee with respect.

[61] Employees’ implied duties include duties of fidelity, the obligation to act loyally and in good faith, to exercise reasonable skill and care in carrying out their duties, and to act honestly by *inter alia*, protecting the employer’s confidential or proprietary information and not using it for personal gain or profit of other people, and not to approach the employer’s customers for business on the employee’s own behalf.

[62] In the Court of Appeal case *Tisco Ltd v Communication and Energy Workers’ Union*<sup>5</sup> the Court of Appeal held that the employment relationship gave rise to reciprocal duties of fidelity and good faith, and that any conduct by an employee which was likely to damage the employer’s business could constitute a breach of duty:<sup>6</sup>

*Any conduct by an employee which is likely to damage the employer’s business, for instance by impairing its goodwill, or to undermine significantly the trust the employer is entitled to place in the employee, could constitute a breach of duty.*

[63] In *Rooney Earthmoving Limited v McTague*<sup>7</sup> Judge Travis observed:<sup>8</sup>

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<sup>2</sup> [1992] 1 ERNZ 711

<sup>3</sup> Ibid at pg [277]

<sup>4</sup> S.4(1)(a) &(b) Employment Relations Act 2000

<sup>5</sup> [1993] 2 ERNZ 779

<sup>6</sup> Ibid at page [782]

<sup>7</sup> CC 10/09, CRC 21/07

<sup>8</sup> Ibid at para [120]

*It appeared to be accepted by the defendants, ... that they owed an implied duty of fidelity and an obligation to act in good faith, which prevented them from making approaches to clients or potential clients of REL on behalf of BMW before they had ceased their REL employment. Before that time, if a client made an approach, the duty of fidelity obliged them to reject that offer of work and report it to REL. .... Further, whether or not a departing employee takes customer lists, that employee may not solicit or approach a client of that employee's former employer in respect of a transaction current at the time of departure. (Medic Corporation v Barrett [1992] 2 ERNZ 1048)*

[64] Ms Dickens and Mr Peter as the sole sales representatives had close relationships with E-Lightings customers and suppliers who dealt with E-Lighting primarily through them. They had full access to confidential information including customer details, customers' requirements, pricing, margins and supplier pricing and commercial arrangements.

[65] During the course of her employment Ms Dickens had incorporated Limelight, with lighting design and supply as its core purpose. Mr Peden having been made aware of the existence of Limelight, had raised no objection but stipulated that this was solely on the basis that:

- (i) there was no conflict of interest;
- (ii) the leads were generated outside of E-Lighting; and
- (iii) did not include E-Lighting customers or suppliers.

[66] In *Schilling v Kidd Garrett Ltd*<sup>9</sup> it was held that an employee intending to go into business on their own account might take preparatory steps even where he or she intended competing against the employer, provided he or she did not do so fraudulently. This was also confirmed in *Rooney Earthmoving Ltd v McTague*

[67] Ms Dickens stated in her untested affidavit evidence that she had used a Hunza price list which she had obtained on the basis that she had hoped that E-Lighting and Limelight would be working together in 2015. The origin of the document was E-Lighting.

[68] Ms Dickens stated in her untested affidavit evidence that she has since deleted this list and a similar file she had built in respect of the LuxR products.

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<sup>9</sup> [1977] 1 NZLR 243

[69] On 2 October 2014 Ms Dickens sent an email to Mr Alastair Peace, her boyfriend, attaching an Excel spreadsheet with E-Lighting General Ledger Codes. In untested supplementary affidavit evidence Mr Peden explained that the E-Lighting General Ledger is a financial report not a sales report which Ms Dickens had no need to access in her role as a sales representative.

[70] Ms Dickens stated in untested supplementary affidavit evidence stated that what she had sent Mr Peace was a list of modified general ledger codes, and not the General Ledger itself. Her intention in sending it to Mr Peace was to assist him with his farm accounting systems.

[71] E-Lighting states that the downloaded General Ledger is the whole of that ledger in the form of a spreadsheet with income and expenses allocated against codes.

[72] I find there is sufficient evidence at this interim stage to suggest that Ms Dickens and Mr Peter obtained this confidential information during the course of their employment with E-Lighting with a view to competing against E-Lighting, and in particular competing with it in respect of an existing supplier, Hunza.

[73] I accept that the names of E-Lighting's customers could not be confidential, as they are in the public domain. However customer information held by E-Lighting relating to design, pricing, packaging and information regarding the suppliers to E-Lighting could arguably be regarded as confidential information.

[74] Therefore given the stated intention of Ms Dickens and Mr Peter to compete directly with E-Lighting I consider it is reasonable to infer at this interim stage that they may well have used confidential information of this type in order to gain business from E-Lighting's customers and suppliers and to further their own interests.

[75] Whilst Ms Dickens and Mr Peter dispute that they contributed to the severance of Hunza's relationship with E-Lighting, this will require findings on disputed issues of fact, however they do concede that there is an arguable case that their dealings with Hunza involved a breach of the duty of fidelity. At this interim stage I find there is an arguable case for a breach of fidelity in respect of Ms Dickens and Mr Peter's dealings with Hunza.

[76] In respect of Task Lighting, whilst Mr Townshend in his untested affidavit evidence casts doubt on whether or not there was an opportunity for E-Lighting to obtain its business and whilst it is no breach of fidelity on the part of an employee to take a business opportunity in setting up their own business provided that business opportunity is not available to the

employer<sup>10</sup>, it is clear from Mr Townshend's evidence that he had agreed with Ms Dickens in 2014, that is, during the currency of her employment with E-Lighting, that Limelight would act as the major distributor for Task Lighting.

[77] Mr Peden's untested affidavit evidence is that he regarded Task Lighting as a potential customer and that he had made Ms Dickens aware of this. Accordingly at this interim stage I find there is an arguable case for a breach of the duty of fidelity in respect of Ms Dickens's and Mr Peter's dealings with Task Lighting

[78] I find that, accepting the inevitable limitations attendant on determining interim injunction applications, E-Lighting has an arguable case for the interim injunctive relief in respect of Ms Dickens and Mr Peter.

### **Where does the balance of Convenience Lie?**

[79] That balance of convenience considers the relative hardship resulting to each party from whether or not interim injunctions were to be imposed on Ms Dickens and Mr Peter.

[80] In the case of E-Lighting, it is submitted that irreparable harm will be caused to its business through its former sales representatives targeting its customers, and selling what was, until the time of their departure, its core product range.

[81] It is accepted that Mr Peden expressed an interest in selling E-Lighting as a going concern to Ms Dickens and Mr Peter which was declined, but that this did not entitle Ms Dickens and Mr Peter to effectively appropriate the E-Lighting business.

[82] It is accepted that Mr Peden has been incapacitated by a serious injury, and has undergone major surgery. He is the only person currently in E-Lighting able to train a new sales employee to the technical standard required and therefore seeks a reasonable time in which to recruit and train a new sales employee and to rebuild his client relationships and business.

[83] It is submitted for the First and Second Respondents that an injunction restraining them from dealing with Hunza or Task Lighting would be pointless on the basis that even if such an injunction was to be imposed, the prospects of E-Lighting reviving the distribution relationship with Hunza or establishing one with Task Lighting are unlikely to occur.

[84] In this context I note the untested affidavit evidence of Mr Foster that as late as 17 December 2014, Mr Cunningham had been asked whether he considered E-Lighting to be a

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<sup>10</sup> *Schilling v Kidd Garrett Ltd* [1977] 1 NZLR 243 at 245

good distributor of E-Lighting products, and he had responded positively with the indication that there would be no change to that situation.

[85] I also note that prior to the end of December 2014, Hunza had been a major client of E-Lighting and that in Mr Cunningham's untested affidavit evidence he comments that: "*New Zealand is an important market for Hunza*".

[86] 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.

[87] In this context, whilst there is some dispute in the untested affidavit evidence about the financial stability of E-Lighting, I find the evidence of Mr Foster, who is to be regarded as in a position of knowledge, states that prior to the resignations of Ms Dickens and Mr Peter, E-Lighting had been in a growth phase and was expected to make substantial profits for 2015, and that it had been up to date with its tax payments.

[88] The impact on third parties is also a consideration. It is submitted for E-Lighting that the closure of E-Lighting as a result of not obtaining an injunction would cause loss of employment to Mr Peden and its two other employees.

[89] It is submitted for Ms Dickens and Mr Peter that if Hunza and Task Lighting are restrained from dealing with them, this will cause them significant cost in finding alternative products to sell. It is further submitted that an injunction would effectively prevent them from earning a living.

[90] According to Ms Dickens' untested affidavit evidence, as the director of Limelight, she had already established the Limelight business and engaged the services of Mr Peter prior to soliciting and/or contacting E-Lighting's clients or obtaining the Hunza distributorship. This does not accord with the comment now made that without the Hunza business both Mr Peter and Ms Dickens would be prevented from earning a living. Additionally as Ms Dickens makes no comment as to Mr Peter's continued employment with Limelight should an interim injunction be imposed on them, it is reasonable to assume that his employment would continue

[91] I therefore consider whether or not damages would be an adequate alternative remedy. It is submitted on behalf of Ms Dickens and Mr Peter that damages will be an adequate remedy to E-Lighting and can be quantified in respect of Hunza and Task Lighting if it is determined that there has been a breach of their employment agreements.

[92] The Applicant submits that if E-Lighting is allowed to continue trading without unfair competition from Ms Dickens and Mr Peter during the period of an interim injunction, it would likely remain a sound business with the ability to pay damages.

[93] Conversely, if the injunction is granted, it is submitted it would make it more difficult for Ms Dickens and Mr Peter to meet any eventual award of damages by temporarily putting them out of business. There is no evidence submitted that Ms Dickens and Mr Peter would be able to meet any award of damages to E-Lighting when the substantive matter is investigated.

[94] Considering these submissions, I conclude that an award of damages would not be an adequate alternative remedy to the issuing of an interim injunction.

[95] Evaluating all the factors to be taken into consideration, I find the balance of convenience to rest with E-Lighting.

### **Overall Justice of the case**

[96] The overall justice consideration requires me to stand back from the detail and consider the case from a more global view. This is a case in which I have found on the untested affidavit evidence available at this interim stage, that Ms Dickens and Mr Peter have breached their implied duty of fidelity and good faith to E-Lighting

[97] In these circumstances I find that the overall justice of the case supports an interim injunction on those activities of Ms Dickens and Mr Peter personally or through Limelight that appear to breach that duty.

[98] I note that E-Lighting does not seek to prevent Ms Dickens and Mr Peter working in the lighting industry completely, and nor does it seek to prevent Ms Dickens or Mr Peter working in or for Limelight providing it does not act as a distributor for Task Lighting or Hunza, or act as a competitor.

[99] Therefore any orders made need 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 the Authority can determine the substantive matters.

### **Orders**

[100] In making the following orders, I have taken into consideration the fact that Ms Dickens and Mr Peter were sales representatives at E-Lighting and therefore 'the face' of E-

Lighting to customers and potential customers, the fact that they were not highly remunerated, the untested affidavit evidence that their individual contracts of employment were unsigned, Ms Dickens's admissions in her untested affidavit evidence that she removed without authorisation confidential information, and the time reasonable to allow Mr Peden to recruit and train a replacement to the required technical standard.

[101] Accordingly the following orders are made on the conditions as set out below:

- 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).

**Note**

[102] If Ms Dickens or Mr Peter is approached by a potential customer who asks them to do work, including the supply of products, in breach of the terms of the interim injunction, they will need to explain that they are legally bound for the moment not to accept or do such work.

[103] Such a potential customer should also be aware of a risk of legal action against them for a penalty under the Act if Ms Dickens or Mr Peter did such work. Section 134 of the Act allows for a penalty for “*every person who incites, instigates, aids or abets any breach of an employment agreement*”. The present penalties are up to \$10,000.00 for a person and \$20,000.00 for a company.

[104] I have noted that Hunza had served a Statutory Demand on E-Lighting. Whilst this is a commercial matter between the two companies, I also noted that from the untested financial information supplied by E-Lighting and Mr Foster, E-Lighting was able to meet the financial requirements of the Statutory Demand.

### **Next Steps**

[105] The Authority will shortly convene a case management conference to set timetable directions for the investigation of E-Lighting’s substantive claims.

### **Costs**

[106] Costs are reserved for determination following the substantive investigation meeting and its outcome or until this matter otherwise ceases to be before the Authority.

Eleanor Robinson  
Member of the Employment Relations Authority