

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2015] NZERA Auckland 300  
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 Respondents

Investigation Meeting: 13 & 14 April, 12 June, and 4 August 2015 at Auckland

Submissions of the parties 4 August 2015 from Applicant  
and from Respondents

Date of Determination: 29 September 2015

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] The Applicant, E-Lighting Limited (E-Lighting), claims that the First Respondent, Ms Gabrielle Dickens, whilst an employee of E-Lighting, took orders and/or made sales of products that were within the portfolio product ranges supplied by E-Lighting for her own benefit and/or that of her company Limelight Design Limited (LDL) thereby depriving it of potential profits. E-Lighting also claims that Ms Dickens took these actions without taking appropriate steps to manage conflicts of interest, and that such actions were in breach of the duty of fidelity.

[2] E-Lighting claims that actions of Ms Dickens and the Second Respondent, Mr Dax Peter, who had whilst employees of E-Lighting arranged to go into business together intending to represent suppliers including E-Lighting's key supplier, Hunza Productions

Limited (Hunza), precipitated the loss of the Hunza distribution agency to E-Lighting resulting in a substantial loss of profits for E-Lighting.

[3] E-Lighting also claims that 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, and that such competition was unfair on the basis that Ms Dickens and Mr Peter were:

- i. Taking advantage of preparations improperly made while in E-Lighting’s employment;
- ii. Making use of confidential information belonging to E-Lighting;
- iii. Leveraging the relationship they had with E-Lighting’s customers; and
- iv. In breach of a contractual restraint of trade

[4] E-Lighting further claims that the Third Respondent Hunza Production Limited (Hunza) aided and abetted the breach of the employment obligations by Ms Dickens and Mr Peter, in particular by terminating the distribution agency arrangement it had with E-Lighting.

[5] Ms Dickens and Mr Peter deny breaching the good faith duty they owed to E-Lighting, and also deny using business relationships they had formed during the course of their employment with E-Lighting to springboard business opportunities for themselves.

[6] Hunza denies aiding and abetting Ms Dickens and Mr Peter to breach their good faith and implied duties to E-Lighting.

## **Issues**

[7] The issues for determination are whether or not:

- Ms Dickens made sales for her own benefit and/or that of LDL in breach of her implied duty of fidelity.
- Ms Dickens and Mr Peter entered into business together with the intention of representing suppliers of electrical lighting products including Hunza and thereby precipitated the termination of the Hunza agency agreement by E-Lighting resulting in a substantial loss of profits to E-Lighting
- Ms Dickens and Mr Peter unfairly competed against E-Lighting as a result of:

- Taking advantage of preparations improperly made whilst employed by E-Lighting;
  - Making uses of E-Lighting's confidential information;
  - Leveraging relationships with E-Lighting's customers; and
  - Breaching of a contractual restraint of trade
- Hunza aided and abetted Ms Dickens and Mr Peter to breach their employment obligations to E-Lighting.

### **Note**

[8] The Authority's investigation into the substantive issues has been lengthy and protracted for various reasons. The course of the investigation process also included three investigation matters which were preliminary in nature, namely the application for an interim injunction in February 2015, a strike out application by Hunza in April 2015, and an application for an extension of the interim injunction in May 2015.

[9] During the course of the hearings, the witnesses answered questions on the witness statements they had provided and – under oath or affirmation – answered questions from me and the parties' representatives. The representatives have also submitted closing submissions on the facts and law.

[10] I have considered those submissions and the evidence, including relevant documents provided by the parties, but, as permitted by s174 of the Act this determination has not recorded all the evidence and submissions received. Instead the determination has stated findings of fact and law, expressed a conclusion on each of the issues necessary to dispose of the matter, and specified orders made as a result

### **Background facts**

[11] 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.

[12] E-Lighting was represented in the market by two sales representatives: Ms Dickens and Mr Peter, both of whom had worked with Mr Ross Peden, sole director and a shareholder

of E-Lighting, in previous businesses prior to their employment at E-Lighting. In addition, Ms Dickens was E-Lighting's business development manager.

[13] Mr Peter commenced employment with E-Lighting in April 2011 as Business Development Representative and his territory covered Northland to the Bay of Plenty including Taupo and Rotorua. Ms Dickens commenced employment with E-Lighting in July 2012 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.

[14] Mr Peden 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.*

[15] 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.

[16] 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.

[17] Mr Peter denied he had been provided with a written employment agreement and Ms Dickens said she had been provided with one, but had not signed it as she had not agreed with the restraint of trade provision clauses.

[18] Mr Peden said that from the outset of Ms Dickens' employment relationship with E-Lighting, it had been his intention to offer her, whom he valued and trusted, shares in the E-Lighting business, however this had not taken place at the date the employment ended.

*Limelight Design Limited*

[19] In August 2012 Ms Dickens incorporated and began operating a lighting business called Limelight Design Limited (LDL), with Mr Peden's knowledge, and said that E-Lighting had commercial dealings with LDL during the ensuing period of her and Mr Peter's employment with E-Lighting.

[20] Ms Dickens said that Mr Peden had been aware of LDL at the time of its incorporation in August 2012, and she had been assisted in that process by Mr Glenn Foster, E-Lighting's accountant.

[21] Ms Dickens said that whilst the first task of LDL was providing labour for LuxR by assembling parts, the core purpose of LDL was lighting design and the supply of electrical lighting products and this was put into effect shortly thereafter.

[22] Mr Peden said that he had agreed to Ms Dickens operating LDL during the course of her employment with E-Lighting on the basis of his understanding that it was a hobby of Ms Dickens, peripheral to the business of E-Lighting, and supplying products and services only to family and friends.

[23] Subsequently Ms Dickens had asked Mr Peden if LDL could sell E-Lighting products and Mr Peden had agreed that she could purchase the E-Lighting products at wholesale prices provided there was no conflict of interest, the customer enquiries were to be generated outside of E-Lighting, and not to include E-Lighting customers or suppliers.

[24] Following the termination of Ms Dickens employment with E-Lighting, Mr Peden said he had become aware of the extent to which Ms Dickens had been engaging in activities on behalf of LDL during the period of her employment at E-Lighting, including Ms Dickens:

- being approached by customers who would have been potential E-Lighting customers and making sales to such customers through LDL. This resulted in E-Lighting being paid a lower price for the product that it would have been paid as if the same sale had been made by E-Lighting itself;
- actively changing sales made by E-Lighting to LDL;
- offering and selling to customers alternative products through LDL rather than actively and specifically marketing E-Lighting's products to them;
- treating customers as LDL customers rather than E-Lightings' customers; and

- conducting business to the advantage of LDL during the course of her working day at E-Lighting.

[25] Ms Dickens said that certain customers had become LDL customers either because E-Lighting could not source the product they required, or because they required product at a lesser price range than that offered by E-Lighting.

[26] Ms Dickens also confirmed that she conducted LDL business during the course of her working day at E-Lighting because the sales opportunities were either not open to E-Lighting on account of the product required, or because this held an advantage for E-Lighting, and also because she worked long hours for E-Lighting for which she was not compensated.

[27] Mr Peden said that he would not have tolerated LDL 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.

#### *Task Lighting*

[28] Task Lighting Limited (Task Lighting) is a lighting supplier focussing on LED lighting products, and as such a partial competitor of E-Lighting. Mr Anthony Townshend, Director of Task Lighting, said that Ms Dickens had purchased product from Task Lighting through LDL.

[29] During Ms Dickens' employment at E-Lighting she and Mr Townshend had discussed opportunities regarding Task Lighting and E-Lighting creating a purchasing alliance.

[30] In early 2014 Mr Townshend 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.

[31] Ms Dickens had subsequently informed Mr Townshend 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.

[32] Mr Peden said that he had advised Ms Dickens that it would not be appropriate for her to represent Task Lighting during the course of her employment with E-Lighting as this would present a conflict of interest; and that if Task Lighting needed representation E-Lighting would represent them and receive a commission on sales.

[33] On or about October 2014 Ms Dickens had spoken to Mr Townshend about the possibility of LDL representing Task Lighting in 2015. Following Ms Dickens resignation from E-Lighting, It had been agreed that LDL would represent Task Lighting in 2015.

#### *Hunza*

[34] 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. LuxR is an associated business to Hunza, making the relationship even more critical to the E-Lighting business.

[35] Mr Andrew Cunningham, Managing Director of Hunza, and Mr Peden had been involved as directors and shareholders in LuxR which had been set up to manufacture and sell LED lighting. There had been issues with the funding of LuxR with Mr Cunningham advancing loans from Hunza to LuxR with partial repayment to Hunza being guaranteed by Mr Peden.

[36] There was a poor payment record between Hunza and E-Lighting since the beginning of their relationship, and there was a poor relationship between Hunza's employees and Ms Karen Sloan, an E-Lighting employee, who had responsibility for E-Lighting accounts payable department.

[37] Hunza's employees were also concerned that Hunza property was leaving its factory without a corresponding paper trail and subsequent payment. During the Investigation Meeting, Mr Peter confirmed that he had personally been taking Hunza products to fulfil E-Lighting orders without creating the requisite paper trail for payment resulting in those products not being paid for by E-Lighting. He also confirmed that this was done without Mr Peden's agreement or knowledge.

[38] At the end of September 2014 Mr Cunningham advised that he was recalling the loan Hunza had made to LuxR and as a result he and Mr Peden entered into negotiations for a transfer of shares in LuxR from Mr Peden to Mr Cunningham in exchange for Mr Peden's release from his personal guarantee.

#### *Meetings between Ms Dickens and Mr Cunningham*

[39] During early October 2014 Ms Dickens said that she had accessed information on the E-Lighting computer system which concerned dealings between Mr Peden and Hunza in respect of LuxR. Ms Dickens said that the nature of her discovery had shocked her.

[40] Ms Dickens said that she did not discuss what she had discovered with Mr Peden but instead arranged a meeting with Mr Cunningham on two separate occasions, the first on 7 October 2014, the second on 14 October 2014.

[41] The evidence of Ms Dickens and Mr Cunningham was not clear on what precisely had been discussed in each of the two meetings, however it is clear that a number of issues were discussed over the course of the two meetings, including (i) the future of the Hunza/E-Lighting relationship; (ii) Ms Dickens' intention to leave the employment of E-Lighting; and (iii) her view on the issues between Mr Peden and Mr Cunningham in regards to the LuxR joint venture.

[42] Mr Cunningham said that during the discussions with Ms Dickens he had not encouraged Ms Dickens to leave her employment at E-Lighting nor had he given her any reason to think that if she left her employment at E-Lighting, LDL would be given the Hunza distributorship in place of E-Lighting.

[43] In October 2014 Ms Dickens and Mr Peter agreed that they would both terminate their employment at E-Lighting effective from the same date and work at LDL, with Mr Peter to receive a salary funded by Ms Dickens and equivalent to that which he was receiving at E-Lighting.

#### *Events after October 2014*

[44] 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.

[45] 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.

[46] 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.

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

[48] On 9 December 2014 Mr Peden emailed Ms Dickens and Mr Peter requesting that they did not discuss the situation or their plans for LDL with customers or potential suppliers until they had together agreed a timetable for doing so.

[49] Ms Dickens' response that same day had been that a number of people were already aware of the situation, including Task Lighting which was: "*on board for the new year*".

[50] Mr Peden also asked if Ms Dickens and Mr Peter would defer their termination date until 31 March 2015, but they refused to do so.

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

[52] Mr Cunningham said 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.

[53] Mr Peden said that he had been dealing with Hunza for over 7 years in which time the payment regime had not changed significantly since 2011 with a variable pattern of payment dates. He said the situation had changed from October 2014 with E-Lighting being placed on a 'stop-credit' if the payment date became 10 days overdue.

[54] Mr Cunningham confirmed during the course of the 4 August 2015 Investigation Meeting that he had not told Mr Peden that he might cease the supply of Hunza product to E-Lighting prior to the announcement being made on 19 December 2014. He agreed that at the time of the announcement Mr Peden might have had a reasonable expectation that nothing would change in the absence of such advice, and that whilst there had always been payment issues, E-Lighting had been a good distributor.

[55] Mr Cunningham said that whilst on an overseas trip during December 2014, he had discussed with Mr Franklin Davis, co-director with Mr Cunningham of Hunza Lighting International Ltd (HLI), steps to be taken to facilitate the future distribution of Hunza products.

[56] Appointing HLI as the New Zealand distributor for Hunza would involve HLI employing more staff and purchasing or leasing vehicles; however Mr Cunningham said that no steps had been taken to effect the appointment of HLI as New Zealand distributor at that stage.

[57] Upon Mr Cunningham's return to New Zealand, he stated that he was informed by the Hunza employees that Ms Dickens and Mr Peter had resigned from E-Lighting.

[58] Mr Peden said that Ms Dickens had been keen to establish a heads of agreement between E-Lighting and LDL, however he had said that because of his impending surgery, this would not be finalised until the New Year, stating in an email to her dated 17 December 2014:

*... I will work with you guys in establishing a mutually beneficial trading arrangement so that we can all achieve our respective goals. It has only been a week since you both informed me of your proposal and I am working on preliminary documents and I will continue working on these over the next couple of weeks with a view to have a formal arrangement in place before the 12<sup>th</sup> January 2015. (Bear in mind my surgery is tomorrow and I will be in hospital for five nights..*

[59] On 17 December 2015 there was a meeting between Mr Peden, Mr Foster and Mr Cunningham to discuss E-Lighting's financial position. At the time of the meeting a 5 year distribution agreement had already been signed between LuxR and E-Lighting, and the purpose of the 17 December 2014 meeting was to discuss a formal distribution agreement between E-Lighting and Hunza.

[60] Mr Peden and Mr Foster both said that during the meeting Mr Cunningham had stated that E-Lighting was a good distributor. Mr Cunningham confirmed that he had made that statement during the course of the meeting, but said that the concerning issue was payment.

[61] He had declined to sign a distribution agreement despite Mr Peden and Mr Foster pressurising him to do so as he said he had not been convinced E-Lighting could continue as a viable distributor. However he had not made this known to either Mr Peden or Mr Foster.

[62] Mr Cunningham said that following the meeting on 17 December 2014 he had decided to terminate further supply of Hunza products to E-Lighting based on a number of factors, including the poor payment history and the unsatisfactory commercial relationship that had occurred between Mr Peden and LuxR.

[63] In his written evidence Mr Cunningham stated that: “ .... *the straw that broke the camel's back was the resignation of Ms Dickens and Mr Peter.*”

[64] Following the notification from Hunza that it was ending the distributorship with E-Lighting 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. However, the attempts were unsuccessful and Ms Dickens's and Mr Peter's employment with E-Lighting terminated with effect from 12 January 2015.

### *Events post-termination*

[65] The Hunza operation was closed until 19 January 2015, however Ms Dickens and Mr Peter met with Mr Cunningham on 14 January 2015, two days after the termination of their employment with E-Lighting.

[66] Promotional materials and terms of trade had been prepared, and Mr Dickens, Mr Peter, and LDL (trading as Lighting Revolution') had been named as Hunza's distributors to New Zealand and the Pacific. Further there is evidence that Ms Dickens and Mr Peter were active in the marketplace, visiting E-Lighting and Hunza customers and promoting LDL as the new entity representing Hunza.

[67] Following the termination of Ms Dickens and Mr Peter's employment, Mr Peden said he had discovered the extent to which Ms Dickens had been conducting LDL activity during the course of her employment with E-Lighting. He said that Ms Dickens had never discussed with him during her employment at E-Lighting the extent of her activities with LDL, he had not agreed to them, and he regarded them as hostile to the activities of E-Lighting.

### **Determination**

[68] As a general principle, contractual provisions which seek to restrain trade or competition are *prima facie* void and therefore unenforceable, it is for a party seeking to rely on such a provision to prove that it is reasonable in terms of the parties' interests and the public interest.

[69] In this case, E-Lighting seek to rely on a contractual restraint of trade provision in respect of the employment of Ms Dickens and Mr Peter in addition to placing reliance on the implied duty of fidelity.

[70] I propose to address the issue of a contractual breach of restraint of trade provisions prior to the issues arising out of an implied breach of fidelity.

### **Are Mr Peter and Ms Dickens subject to contractual restraint of trade provisions?**

[71] Mr Peter and Ms Dickens do not dispute that a contract for service existed between each of them and E-Lighting, however no written employment agreements signed by both parties have been produced in evidence. The fact that such an agreement was not in writing does not render it unenforceable.

*Mr Peter*

[72] Mr Peden's evidence was that Mr Peter and he had agreed that the basis of his employment with E-Lighting would be on the same terms and conditions of employment as those, which applied when he had been employed at Lighting Pacific Limited. The written employment agreement with Lighting Pacific contained a contractual restraint of trade clause.

[73] Mr Peter denies having received a written employment agreement during his period of employment with E-Lighting,

[74] In his written evidence, Mr Peter confirmed that he had an employment agreement when he worked at Lighting Pacific Limited, and agreed under cross examination that he assumed the terms of his employment with E Lighting would be the same as those he had at Lighting Pacific Limited. He also confirmed that he knew the terms of his employment with Lighting Pacific Limited had included a restraint of trade clause.

[75] Further I consider that, Mr Peter's employment at Lighting Pacific Limited having been terminated at the time he was made an offer of employment at E-Lighting by Mr Peden, it would not be unreasonable to assume that he had accepted the job on the same terms as he had at Lighting Pacific Limited, including a restraint of trade clause.

*Ms Dickens*

[76] Ms Dickens gave evidence that the terms of her employment at E Lighting were agreed verbally with Mr Peden at an evening dinner meeting, and that she requested a written copy of the proposed employment agreement.

[77] Ms Dickens provided in evidence a copy of the written employment agreement provided to her by E-Lighting, however whilst it had been signed by Mr Peden. It had not been signed by her.

[78] Ms Dickens' evidence was that she had been presented with the written employment agreement containing the restraint of trade clauses after she had been employed by E-Lighting for six weeks. She said she had not agreed with the restraint of trade clauses and had not signed the written employment agreement provided to her by Mr Peden on that basis.

[79] In the circumstances I conclude that Ms Dickens had initially accepted the offer of employment with E Lighting on the same terms as those at Lighting Pacific Limited, however I accept that Ms Dickens did not intend to accept the restraint of trade clause in the written draft agreement.

[80] Employers are under a duty pursuant to s 63A of the Employment Relations Act 2000 (the Act) to provide employees at the time of engagement with: “ a copy of the intended agreement”<sup>1</sup> and provide the employee with an opportunity to seek independent advice on the intended agreement.

[81] Pursuant to s. 64 of the Act, employers must: “retain a signed copy of the employee’s individual employment agreement or the current terms and conditions of employment that make up the employee’s individual terms and conditions of employment”.

[82] E-Lighting has been unable to provide a signed copy of written employment agreements pertaining to Ms Dickens and Mr Peter’s employment with E-Lighting.

[83] In *Auto-Movements (NZ) Ltd v Eveleigh*<sup>2</sup> the Employment Court held that:<sup>3</sup>

*[36] On the facts in this case, even if the past behaviour of the parties in agreeing to restraints of trade in two previous contracts were to be taken as evidence of a particular course of conduct governing a relationship; this is not sufficient to meet the conditions for implication of terms. ...*

*[39] A restraint of trade clause is not an integral part of a contract of employment. It is certainly not so obvious it goes without saying. It requires consideration and express agreement to be enforceable and the reasonableness of its terms are open to close scrutiny.*

[84] Although I have accepted that Ms Dickens and Mr Peter may have had restraint of trade provisions in their unsigned (in the case of Ms Dickens) and oral (in the case of Mr Peter) previous employment agreements, I do not accept that this is sufficient for enforcement purposes to imply such terms into their employment agreements with E-Lighting. The requirement for agreement is especially necessary because contractual provisions in restraint of trade are prima facie void.

[85] The statutory onus was on E-Lighting as the employer to ensure that restraint of trade provisions had been included and agreed in written employment agreements between itself and Ms Dickens and Mr Peter. It did not do so and is in breach of the statutory requirements to ensure that a copy of the intended agreement was provided to Ms Dickens and Mr Peter, and a signed copy retained. Accordingly I find that it cannot now seek to place reliance on contractual restraint of trade provisions.

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<sup>1</sup> S 63A (2)(a)

<sup>2</sup> [2007] ERNZ 370

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[86] I determine that Ms Dickens and Mr Peter are not subject to contractual restraint of trade provisions with E-Lighting.

### ***Breach of Implied Terms***

[87] An employment relationship is not defined by the written terms and conditions alone, employers and employees owe each other certain implied duties and obligations, one of which is the duty of fidelity.

[88] As observed in an earlier determination involving the same parties, [2015] NZERA Auckland 61, the duty of fidelity encompasses the obligation to act loyally and in good faith, 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.

[89] In the Court of Appeal case *Tisco Ltd v Communication and Energy Workers' Union*<sup>4</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>5</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.*

[90] In *Rooney Earthmoving Limited v McTague*<sup>6</sup> Judge Travis observed:<sup>7</sup>

*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*

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<sup>4</sup> [1993] 2 ERNZ 779

<sup>5</sup> Ibid at page [782]

<sup>6</sup> CC 10/09, CRC 21/07

<sup>7</sup> Ibid at para [120]

*employee's former employer in respect of a transaction current at the time of departure. (Medic Corporation v Barrett [1992] 2 ERNZ 1048)*

[91] I find that Ms Dickens and Mr Peter had a duty of fidelity and of good faith towards E-Lighting.

**Did Ms Dickens make sales for her own benefit and that of LDL in breach of her implied duty of fidelity?**

[92] Ms Dickens was E-Lightings' business development manager and a sales representative. The purpose of her role was to generate business leads and make sales for E-Lighting, and to further maximise its profitability.

[93] Ms Dickens had worked with Mr Peden in a previous business and the evidence is that they had a good working relationship in which trust played a key part.

[94] Together she and Mr Peter represented E-Lighting to its customers and therefore she was in a unique position in which to act in such a way that her own company LDL could benefit from the contacts and relationships she had built up in E-Lighting.

[95] Whilst Mr Peden had been aware of and agreed to LDL operating during the period of Ms Dickens' employment, his evidence was that he had been unaware of the extent of its activities which had extended far beyond the concept of a small supply of lighting components to family and friends to which he had agreed.

[96] The evidence provided which included emails between Ms Dickens and customers indicates a blurring of the line of demarcation between actions to the benefit of E-Lighting, and those to the benefit of LDL. Examples include:

- Customers being told that Ms Dickens worked for both E-Lighting and LDL;
- Ms Dickens making sales for LDL during her normal working hours at E-Lighting;
- Use of Ms Dickens' E-Lighting email account on LDL matters;
- Use of her E-Lighting company vehicle and travel arrangements made and paid for by E-Lighting on LDL business.

[97] Having considered all the evidence provided by the parties, and the explanations provided, I do not find it credible that an employer would agree to an employee acting in such

a way and to such an extent during the course of his or her employment as appears to have been the case by Ms Dickens.

[98] Ms Dickens did not apprise Mr Peden of the potential areas of any conflict of interest between E-Lighting and LDL, there was no proper demarcation and identification of sales attributed to LDL and I find that the identity of one customer, Stu's Trim and Sound, was deliberately obscured by the job being renamed "Beach".

[99] In regards to Ms Dickens' failure to clearly delineate between her actions on behalf of E-Lighting, and to the benefit of LDL, I note her comment in an email dated 14 November 2014 to Mr Nick Gill, a customer, referring to product required by a customer, that: *"Can be limelight rather than e-lighting,*

[100] In an email to Mr Stu Warman, another customer, dated 24 November 2014, Ms Dickens wrote: *"As you are aware, I work for both E-Lighting and through limelight design I've supplied these fittings to you at a price not even an electrician might access from E-Lighting"*. The email continues to point out that Ms Dickens had also been able to source the order from Hunza in a record time frame compared to the usual time frame operated by E-Lighting, and commented that: *This meant I didn't have anyone working on our other urgent and non-urgent orders"*..

[101] Mr Emmett McAteer in an email dated 12 March 2015 and referring to Ms Dickens' involvement with Mr Warman during November 2014 states: *"I also gave it to her as I knew she was trying to establish her new lighting venture (Limelight Design) at this time.*

[102] I note that the bulk of the sales of LDL products increased significantly in the last period prior to Ms Dickens' resignation from E-Lighting, in particular in the period following the Auckland Home Show.

[103] The sales benefitted LDL and not E-Lighting which I consider to indicate that the LDL was a significant beneficiary of Ms Dickens' actions and time during her employment rather than her employer E-Lighting.

[104] In examining the evidence before me, I find that Ms Dickens during the course of her employment with E-Lighting, made sales for her own benefit, or that of the company she then owned, LDL, thereby depriving E-Lighting of profits

[105] I determine that these are actions which represent a serious breach of the core obligations of an employee.

**Did Ms Dickens and Mr Peter enter into business together with the intention of representing suppliers of electrical lighting products including Hunza and thereby precipitated the termination of the Hunza distribution agency agreement with E-Lighting resulting in a substantial loss of profits to E-Lighting?**

[106] Ms Dickens had conversations with Mr Cunningham during October 2014 during which the future of the Hunza and E-Lighting relationship had been discussed. In addition the discussions included the possibility of her resigning from E-Lighting and her views on the information she had discovered and felt about E-Lighting and LuxR.

[107] Prior to Ms Dickens resigning, she had taken Hunza product codes and pricing information from E-Lighting. Whilst this information was not confidential being available to E-Lighting customers, I observe there was no need for her to take this information to facilitate her sales responsibilities at E-Lighting given that it was available to her in the course of her daily work at E-Lighting. Nor can an employee lawfully take with them information such as codes and pricing lists to use in a competing role after the employment has ended.

[108] It is a breach of core employment obligations for employees acting in concert to secure clients for a new business venture whilst still employed<sup>8</sup>

[109] I note that within a short time of their resignations taking effect, the evidence is that Ms Dickens and Mr Peter had:

- prepared promotional materials and terms of trade;
- been named (as Lighting Revolution) as the Hunza distributors to New Zealand;
- actively visited customers representing Hunza; and
- they were the only distributors named on the Hunza website for New Zealand and the Pacific.

[110] They had made a number of people outside of E-Lighting aware of their intended resignations; this included Mr Cunningham, and was prior to Mr Peden responding to the proposal of a contractual relationship with E-Lighting.

[111] The termination of the E-Lighting/Hunza distribution relationship was announced at a Hunza function held on 19 December 2015 at which Ms Dickens and Mr Peter were present, and before Mr Cunningham emailed Mr Peden proposing that it be terminated..

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<sup>8</sup> *Rooney Earthmoving Ltd V McTague* [2009] ERNZ 2490

[112] Mr Cunningham's evidence on 4 August 2015 was that customers would contact Hunza direct if they needed product. However his earlier evidence at the interim hearing was that it was important to Hunza to have appropriate distribution arrangements in place, and significantly he had had some discussion with Mr Davis about the possibility of HLI representing Hunza in New Zealand and the Pacific.

[113] Significantly no steps had been taken in regard to recruiting employees and purchasing vehicles to facilitate HLI representing Hunza by 19 December 2014, the date of the termination of the supply arrangement with E-Lighting.

[114] I do not consider it likely that Hunza would terminate its distribution arrangements with E-lighting, acknowledged by Mr Cunningham to be a good distributor, stating in his evidence that: "*I confirm that the applicant (E-Lighting) was a successful distributor in securing sales for Hunza products*" without appropriate alternative sales representation, being Ms Dickens and Mr Peter, in place.

[115] In regards to Task Lighting, steps were taken by Mr Townshend following discussions with Ms Dickens during 2014 to terminate the existing arrangements Task Lighting had for representation in order that it could be represented by Ms Dickens and Mr Peter, and promotional materials were developed.

[116] Task Lighting was only a minor customer of E-Lighting, and therefore the effect of Ms Dickens and Mr Peter's actions were less damaging to E-Lighting than the Hunza situation.

[117] However I consider that Ms Dickens' and Mr Peter's actions in agreeing during the course of their employment with E-Lighting to enter into business together and to represent Task Lighting were not the actions of employees acting in fidelity to their employer, especially given the timing and Mr Peden's advice to Ms Dickens that it would not be appropriate for her to represent Task Lighting during the course of her employment with E-Lighting as this would represent a conflict of interest..

[118] I find that Ms Dickens and Mr Peter entered into business together in accordance with an agreement reached in October 2014 with the intention of representing suppliers, especially Hunza, and thereby precipitated the loss of the Hunza business with a resultant loss of profits to E-Lighting.

**Did Ms Dickens and Mr Peter unfairly competed against E-Lighting :**

- (i) *By taking advantage of preparations improperly made whilst employed by E-Lighting?*

[119] Preparations by an employee in respect of a future after the ending of the employment relationship are not necessarily inconsistent with the duty of fidelity; however preparations which would be hostile to the interests of the employer are inconsistent with the duty of fidelity.<sup>9</sup>

[120] I consider that Ms Dickens did not breach her duty of fidelity by incorporating LDL or creating terms of trade and promotional materials for it.

[121] However, as previously set out, I find that Ms Dickens had taken steps during the course of her employment with E-Lighting in respect of providing future representation to both Hunza and Task Lighting. Ms Dickens had also taken steps during the course of her employment at E-Lighting to email and facilitate orders for LDL using E-Lighting's computer and email facilities.

[122] I do not find that Mr Peter took advantage of preparations improperly made during the course of his employment, although I accept he benefitted from preparations made by Ms Dickens after his employment with E-Lighting had ceased as a result of Ms Dickens' actions.

[123] The actions taken allowed Ms Dickens and Mr Peter better market access in the period following their resignations, and I find that they had thereby taken advantage of preparations improperly made during the course of their employment with E-Lighting.

- (ii) *By making uses of E-Lighting's confidential information?*

[124] Ms Dickens confirmed that she had taken Hunza product codes and pricing from E-Lighting prior to her resignation becoming effective. As previously observed, this information was freely available to E-Lighting customers; however an employee cannot take such information during the course of their employment to use in a competing role.

[125] Nonetheless I do not find that the information taken from E-Lighting by Ms Dickens was confidential information and consequently I do not find that she unfairly competed against E-Lighting in respect of this aspect of E-Lighting's confidential information.

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<sup>9</sup> *Space Industries (1979) Ltd v McKavanagh* [2000] 1 ERNZ 490, at pg 503: "While there can be no exception taken to an employee preparing for a new business whilst still employed, this must not be at the expense of their current employer".

[126] There is no evidence that Mr Peter took any of E-Lighting's information, confidential or otherwise in breach of his duty of fidelity.

(iii) *By leveraging relationships with E-Lighting's customers?*

[127] Ms Dickens and Mr Peter were E-Lighting's sole sales representatives. They represented E-Lighting in the market place, they visited customers and suppliers and in that respect they exercised considerable influence on the potential for sales of E-Lighting.

[128] During the course of her employment with E-Lighting Ms Dickens made sales to customers via LDL, sometimes changing the sales from E-Lighting to LDL, and offering E-Lighting customers alternative products through LDL.

[129] I find that Ms Dickens leveraged relationship with E-Lighting customers to her own and/or LDL's benefit. I find no evidence that Mr Peter did so.

**Did Hunza aid and abet Ms Dickens and Mr Peter to breach their employment obligations against E-Lighting?**

[130] Ms Dickens and Mr Peter were in an employment relationship with E-Lighting. Mr Cunningham was well aware of that employment relationship, and as the director of Hunza and an employer, was aware of the obligations which exist implied or otherwise between an employer and an employee.

[131] In accordance with s. 134(2) of the Act:

*Every person who incites, instigates, aids, or abets any breach of an employment agreement is liable to a penalty imposed by the Authority.*

[132] It is not necessary for Hunza to know the exact terms of the employment obligations between Ms Dickens, Mr Peter and E-Lighting, but in order to aid and abet it must know of the agreement and deliberately intend to interfere with it.<sup>10</sup>

[133] When considering the issue of whether or not Hunza aided and abetted the breach by Ms Dickens and Mr Peter of their employment obligations I find the following factors significant:

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<sup>10</sup> *Credit Consultants Debt Serviveces NZ Ltd v Wilson (No 3)* [2007] ERNZ 252 at [76]

- i. In October 2014 Ms Dickens had agreed to enter into business with Mr Peter, and employ him in LDL on terms which included the same salary level as that which pertained to his employment at E-Lighting.
- ii. The Task Lighting distributorship had been agreed for the future, however that alone, or even with the LDL business, would not support their combined salaries at the same level as that with E-Lighting.
- iii. At the time of their resignations, Ms Dickens' evidence is that LDL had only \$15,000.00 in reserve funding
- iv. The problems regarding the LuxR relationship were well-known to Mr Cunningham, but a situation of poor payment had been tolerated over a number of years.
- v. The problems in respect of the E-Lighting - LuxR agreement were well-known to Mr Cunningham but did not deter him (Lux-R) from entering into a 5 year distribution arrangement with E-Lighting.
- vi. In October 2014 Mr Cunningham knew from his conversations with Ms Dickens that she was extremely upset and that her resignation was a distinct possibility.
- vii. Despite knowing that Ms Dickens and Mr Peter were: "*the face of Hunza in New Zealand*" Mr Cunningham in light of his knowledge about the poor payment history of E-Lighting and the potential resignations of Ms Dickens and Mr Peter, took no steps to replace E-Lighting with HLI or any other company as the Hunza distributor in New Zealand and the Pacific.
- viii. Ms Dickens took Hunza pricing and code information from E-Lighting prior to her resignation which would have been of no value to her following her resignation unless she and Mr Peter intended to represent Hunza following their resignations.
- ix. Mr Cunningham arranged to meet Ms Dickens and Mr Peter in January 2015, immediately after the expiry of their notice periods, and before Hunza opened for business following the annual shutdown period.
- x. Ms Dickens and Mr Peter, trading as Lighting Revolution, were named as Hunza's distributors on the Hunza website and promotional materials and terms of trade were prepared within a few days of the resignation date.

[134] I find that this evidence makes it more credible than not that Hunza had made representations to Ms Dickens and Mr Peter regarding a future distributorship with Hunza that encouraged Ms Dickens to take steps during her employment in relation to that future relationship, and for her and M Peter to resign their employment at E-Lighting.

[135] In addition, in reliance on this shared understanding of representation, Hunza terminated the informal distribution agreement with E-Lighting which had subsisted for some years despite a poor payment history.

[136] Consistent with this conclusion is the fact that Mr Cunningham had not taken any steps by December 2014 to replace E-Lighting as the New Zealand and Pacific distributor of Hunza products despite knowing that to do so using HLI would have implications for staffing and vehicle requirements.

[137] I also take into account the fact that Mr Cunningham confirmed in his evidence of February 2015 that if LDL (effectively Ms Dickens and Mr Peter) were not distributing Hunza products there would be a significant cost in financial terms and future sales credibility to Hunza. He also stated that:

*If Hunza was forced to rely on alternative distributors there will be a delay for Hunza and a disruption to supply to customers, while alternative distributors employ suitable representatives, become familiar with the specialist technology required to sell Hunz products, undertake product training and establish contact with customers*

[138] Whilst in the 4 August 2015 Investigation Meeting Mr Cunningham said he had not been too concerned about the New Zealand distributorship of Hunza products as he believed Hunza customers would come direct to Hunza to source the products, I do not find this statement credible given the above facts, all of which indicate that Hunza required immediate representation following the termination of its agreement with-E-Lighting.

[139] I determine that Hunza aided and abetted Ms Dickens and Mr Peter to breach their employment contract with E-Lighting by entering into an understanding during their employment with E-Lighting of a distribution agreement following their resignations.

## Remedies

### Penalties

[140] E-Lighting is seeking penalties against Ms Dickens, Mr Peter and Hunza.

[141] The standard of proof in respect of penalties is the civil standard of “on the balance of probabilities”.

[142] Penalties fall to be awarded pursuant to s 134 of the Act which states:

#### **134 Penalties for Breach of employment agreement**

*(1) Every party to an employment agreement who breaches that agreement is liable to a penalty under this Act.*

*(2) Every person who incites, instigated, aids, or abets any breach of an employment agreement is liable to a penalty imposed by the Authority.*

[143] When considering whether or not penalties should be awarded, the then Chief Judge Goddard observed that there are three issues to be considered: as set out in the Employment Court case *Xu v McIntosh*<sup>11</sup>, namely

- i. How much harm has the breach occasioned?*
- ii. How important is it to bring home to the party in default that such behaviour is unacceptable?*
- iii. Was the breach technical and inadvertent or was it flagrant and deliberate?*

#### ***Ms Dickens***

[144] I find that Ms Dickens breached her employment agreement with E-Lighting in respect of the duty of fidelity she owed it by:

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<sup>11</sup> [2004] 2 ERNZ 448

- Trading through LDL whilst in the employment of E-Lighting beyond the agreed limits and in such a way as to divert sales/orders from E-Lighting to LDL and thus make an improper financial gain for herself;
- Sourcing LDL solutions to customers' lighting requirement rather than promoting E-Lighting products;
- Taking confidential information, namely Hunza price lists with a view to using these to promote her own or LDL's business;
- Discussing matters with Mr Cunningham on two occasions in October 2014 which had the potential to adversely affect E-Lighting's relationship with Hunza; and
- Recruiting Mr Peter to work in LDL's business rather than remain in employment with E-Lighting.

***Mr Peter***

[145] I find that Mr Peter, jointly engaged on a new employment venture with Ms Dickens, whilst not as culpable as Ms Dickens, together with her:

- Prepared to go into business representing a competitor of E-Lighting whilst still employed by E-Lighting;
- Prepared to go into business with Hunza, E-Lighting's key supplier;
- Was under a duty to, but failed to, alert E-Lighting of any risk to its relationship with Hunza; and
- Discussed their intended resignations with third parties, including Hunza.

[146] I further observe that the unauthorised and improper practice of Mr Peter of taking Hunza product from its premises without creating a paper and payment trail contributed to Hunza's concern with E-Lighting's performance.

[147] I find that these breaches significantly harmed the relationship between E-Lighting and its suppliers and customers.

## *Hunza*

[148] I have found that Hunza aided and abetted Ms Dickens and Mr Peter to breach their employment agreement with E-Lighting. Whilst I have found no contractual restraint of trade provisions, the implied duties of employees under an employment agreement including that of fidelity should have been well known to Mr Cunningham as an experienced manager of employees.

[149] I find that the breach deprived E-Lighting of the services of two experienced sales employees and caused significant and on-going harm to it.

[150] It is not acceptable for parties to respectively employment relationships and commercial relationships to indulge in behaviour which has the potential to irretrievably damage such relationships.

[151] Further I find that in this case, the breaches committed by the parties have been flagrant and deliberate.

**[152] I order Ms Dickens to pay \$7,000.00 as a penalty pursuant to ss 134(1) and 135 of the Act, in respect of promoting and trading through LDL beyond the agreed limits during the course of her employment with E-Lighting. Pursuant to s.136(2) of the Act the penalty is to be paid to E-Lighting.**

**[153] I order Ms Dickens to pay \$3,000.00 as a penalty pursuant to ss 134(1) and 135 of the Act, in respect of discussing matters with Mr Cunningham which had the potential to adversely affect E-Lighting's on-going relationship with Hunza. Pursuant to s.136(2) of the Act the penalty is to be paid to E-Lighting.**

**[154] I order Mr Peter to pay \$3,000.00 as a penalty pursuant to ss 134(1) and 135 of the Act. Pursuant to s.136(2) of the Act the penalty is to be paid to E-Lighting.**

**[155] I order Hunza to pay \$10,000.00 as a penalty pursuant to ss 134(2) and 135 of the Act. Pursuant to s.136(2) of the Act the penalty is to be paid to E-Lighting.**

## **Damages**

[156] This determination addresses the question of liability for damages, but does not address the quantum of such damages which would fall to be determined subsequently if necessary to do so. I note in this respect that quantifying all such losses may be difficult.

[157] In terms of liability for damages, I found that Ms Dickens and Mr Peter breached their employment obligations to E-Lighting.

(i) *LDL*

[158] There has been evidence submitted that points to Ms Dickens benefitting for herself or LDL during her employment at the expense and to the loss of E-Lighting. Ms Dickens' E-Lighting sales during the 2014 trading year were significantly below those of Mr Peter; however the activity of Ms Dickens on behalf of LDL increased during the period. This lends itself to the conclusion that Ms Dickens was utilising time and resources which should have been allocated to the benefit of E-Light's business to that of her own.

[159] It is not equitable that an employee should be unjustly enriched through their own wrongdoing and at the expenses of the wronged party<sup>12</sup> Promotion of LDL business at the expense of E-Lighting's business would I accept result in loss to E-Lighting for which damages would be attributable.

(ii) *Hunza*

[160] E-Lighting lost the Hunza distributorship which it had retained throughout several years during which it was accepted that payment had been poor. Nonetheless the evidence points to the conclusion that, but for the resignations of Ms Dickens and Mr Peter, the relationship may have subsisted, especially given (i) the tolerance of the poor payment record throughout the relationship; (ii) E-Lighting's achievement as a good distributor for Hunza; and (iii) evidence of a 5 year distributorship agreement having been entered into by Hunza, E-Lighting and Lux-R at the end of 2014.

[161] I find it significant that E-Lighting had been placed on 'stop-credit' by Hunza on or about the time Ms Dickens held her discussions with Mr Cunningham, and advised him that she was contemplating resignation from E-Lighting. The stop credit situation further arose in December 2014 just prior to the termination of the Hunza/E-Lighting distribution agreement.

[162] The effect of E-Lighting being placed on 'stop-credit' was to limit Hunza's liability, the timing of which is just prior to Hunza transferring the distribution rights to Ms Dickens and Mr Peter operating as LDL/Lighting Revolution.

[163] In consideration of these matters I find that Ms Dickens and Mr Peter's actions in breaching their employment obligations were a material cause of E-Lighting losing the Hunza

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<sup>12</sup> *Foai v Air New Zealand* [2012] ERNZ 229, [48 – 52]

distribution agreement and that this represented a significant loss to E-Lighting for which Ms Dickens and Mr Peter bear liability in damages.

[164] I find that Ms Dickens and Mr Peter's actions in preparing to leave E-Lighting's employment and represent Hunza and Task Lighting relate to their joint actions for which any damages awarded will be jointly and severally liable.

#### **Next Steps**

[165] The Authority will shortly convene a case management conference to set timetable directions for the investigation of quantum in respect to the damages claims.

#### **Costs**

[166] Costs are reserved for determination following the final resolution of this matter or until this matter otherwise ceases to be before the Authority.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**