IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2015] NZERA Auckland 119
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 First and Second Respondents Peter Davey, Counsel for Third Respondent	
Investigation Meeting:	21 April 2015 at Auckland	
Submissions of the parties	16 April 2015 from Counsel for Applicant 9 April 2015 from Counsel for Third Respondent	
Date of Determination:	23 April 2015	

INTERLOCUTORY DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] In a Statement of Problem filed in the Authority on 21 January 2015, the Applicant, E-Lighting Limited (E-Lighting), claims that the First and Second Respondents, Ms Gabrielle Dickens and Mr Dax Peter, breached their duties of fidelity towards it by depriving E-Lighting of potential profits by failing to manage conflicts of interest.

[2] Specifically E-Lighting claims Ms Dickens and Mr Peter, whilst still employees, arranged to go into business together with the intention of representing suppliers to E-Lighting, including E-Lightings key supplier, Hunza Productions Limited, the Third

Respondent (Hunza). This was done in breach of Ms Dickens and Mr Peter's duty of fidelity to E-Lighting. E-Lighting claims that these breaches were aided and abetted by Hunza.

[3] E-Lighting further claims that immediately upon their resignations taking effect on 12 January 2015, Ms Dickens and M Peter were directly competing against E-Lighting, by representing Hunza and a company, Task Lighting, to previous customers of E-Lighting. This was in breach of a claimed contractual restraint of trade, and in spring-boarding on Ms Dickens and Mr Peter's duties of fidelity.

[4] E-Lighting is seeking penalties and damages in respect of the First and Second Respondents, and a penalty in respect of the Third Respondent, Hunza, for aiding and abetting the First and Second Respondents' employment agreement breaches.

[5] Hunza has filed an application to dismiss the penalty claim against it on the basis that it is frivolous.

[6] E-Lighting submits that it has a strongly arguable case in relation to the allegations in respect of Hunza, and that the claims against it are not futile, frivolous or vexatious.

Issues

[7] This determination addresses the application for the dismissal of the penalty claim by E-Lighting against Hunza.

Brief Background Facts

[8] 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.

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

[10] In or before October 2014 Ms Dickens and Mr Peter decided that they would both leave E-Lighting and work together at Limelight Design Limited (Limeligght), a company at that time owned by Ms Dickens, with Mr Peter effectively being Ms Dickens's employee.

[11] On 7 and 14 October 2014 Ms Dickens had meetings with Mr Cunningham, CEO of Hunza, and during the meeting on 7 October 2014 Ms Dickens' untested affidavit evidence is that Mr Cunningham referred to her leaving E-Lighting, albeit in terms of hoping she would

not do so, and during the meeting of 14 October 2014 she informed Mr Cunningham that she had decided to leave E-Lighting and pursue Limelight Design Limited.

[12] On 9 December 2014, Ms Dickens and Mr Peter gave written notice of the resignation of their employment with E-Lighting.

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

[14] Mr Peden attempted to dissuade Ms Dickens and Mr Peter from resigning 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.

[15] 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.

[16] With effect from early 2015 Ms Dickens and Mr Peters began competing against E-Lighting, and on 26 February 2015 an interim injunction was issued[1] which enjoined Ms Dickens and Mr Peters from personally, directly or indirectly:[2]

> *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*

[17] On 9 April 2015 Hunza filed submissions in support of an application to dismiss the penalty claim by E-Lighting against it. E-Lighting filed submissions in response on 16 April 2015.

[18] The Second Respondent, Mr Peter , gave evidence at the Investigation Meeting held on 14 April 2015 that Limelight had been (prevented from dealing with Hunza as a result of the Authority's interim injunction, and that the injunction had placed him under financial pressure, and been detrimental to his career and earning potential.

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[1] [2015] NZERA 61

[2] Ibid at para [101] iii

Submissions

[19] Mr Davey, on behalf of Hunza, submits that there must be clear evidence on which a penalty claim is based. Hunza accepts that the court may draw inferences, but submits that it may not make conclusions without clear evidence.

[20] Hunza submits in respect of a claim based upon a breach of fidelity, that E-Lighting's claim that Hunza aided and abetted Ms Dickens and Mr Peter to breach their duty of fidelity is based upon pure speculation, and the evidence does not establish any wilful act by Hunza to aid and abet any breach of fidelity or to undermine the employment relationship.

[21] Further in respect of a claim based on breach of a contractual restraint of trade,, that as there is no express agreement that the restraint of trade provision is part of an employment agreement between E-Lighting and Ms Dickens and Mr Peter, such a term cannot be implied into the employment agreements of Ms Dickens and Mr Peter on the basis that silence does not constitute acceptance.[3].

[22] Moreover it is submitted that the restraint of trade clause would in any event be unenforceable because it is unreasonable in that it effectively seeks to restrict competition rather than to protect E-Lightings proprietary interests.

[23] Mr Fleming on behalf of E-Lighting, submits that it has a strongly arguable case that it was harmed by actions of the First and Second Respondents that were in breach of their employment obligations, and those actions were aided or abetted by the Third Respondent.

[24] E-Lighting base its submissions on the fact that inferences as to a breach of fidelity can be drawn from the affidavit and witness statement filed by Ms Dickens regarding her actions prior to the termination of her employment with E-Lighting, including those related to Hunza, and on inferences drawn from the oral evidence of Mr Peter which has been heard by the Authority.

[25] E-Lighting submits that restraint of trade clauses have been implied by the courts through words and actions of the parties, and that is the case in respect of the employment by Ms Dickens and Mr Peter.

[26] Further that the alleged restraint of trade clauses were reasonable in circumstances which included Ms Dickens and Mr Peter being subject to identical restraint of trade clauses in their employment agreements when employed as Lighting Pacific, a company of which Mr Peden was a director at that time, and being the sole sales representatives of E-Lighting.

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[3] *Sutherland Limited v Subaru (Australia) PTY Limited* [1999] CP211/SW99

Determination

[27] A penalty may be awarded if it is determined that a party to an action has incited, instigated, aided or abetted a breach of an employment agreement, pursuant to s 135 of the Act. The penalty claim against Hunza is in respect of it having aided and abetted the First and Second Respondents in a breach of their employment agreements with E-Lighting.

[28] Section 134 (2) of the Act is relevant to the issue of inciting, instigating, aiding and abetting and states:

> ***Section 134 Penalties for breach of employment agreement***
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> *(2) Every person who incites, instigates, aids or abets any breach of an employment agreement is liable to a penalty imposed by the Authority.*

[29] The wording of s134 (2) is generally accepted as clearly deriving from s 66 of the Crimes Act 1961. In criminal law cases the standard of proof to be applied is that of 'beyond reasonable doubt' however it is the lesser civil standard of proof, 'on the balance of probabilities', which is applied in the employment jurisdiction. In *Xu v McIntosh (Xu)*[4] the then Chief Judge Goddard stated:[5]

> *… In all instances, that is to say in both the personal grievance and the penalty action, the standard of proof required to be attained to discharge the relevant burden of proof is the standard applying in all civil cases: proof on a balance of probabilities. In criminal cases, the higher standard of proof beyond reasonable doubt is required but that has no application in this Court except when it is exercising express criminal jurisdiction or is contemplating imprisonment for disobedience to an injunction or a compliance order.*

[30] I find that the standard of proof to be applied in this case is the civil standard of 'on the balance of probabilities'.

[31] Hunza is seeking to have the penalty claim against it dismissed. This is essentially an application to strike out the claim by E-Lighting that Hunza aided and abetted a breach of the employment agreement between E-Lighting and Ms Dickens and the employment agreement between E-Lighting and Mr Peter. In a case before the Employment Court, *Newick v Working In Limited(Newick)* [6] Judge Inglis outlined the criteria to be applied in the case of strike out applications as:

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[4] [2004] 2 ERNZ 448
[5] Ibid at para [29]
[6] [2012] NZEmpC 156

[2] There is no dispute that the Employment Court has power to strike out all or part of a pleading. The criteria applying to strike out applications are well accepted, and can be summarised as follows:

a) It is assumed that facts pleaded are true;

b) The cause of action must be so clearly untenable that it cannot possibly succeed;

c) The jurisdiction is to be exercised sparingly;

d) The jurisdiction to strike out is not excluded where the claim includes difficult questions of law requiring extensive argument;

e) *The Court should be slow to strike out a claim in a developing area of law.*

[3] A claim should not be summarily struck out unless the Court can be certain that it cannot succeed.

[4] The Court can strike out a pleading where it constitutes an abuse of the Court's process.

Facts as pleaded
[5] On a strike out application the Court proceeds on the assumption that the facts as pleaded are true. Whether or not they can be established is an issue that will be determined at the substantive hearing. [Footnotes omitted}

[32] The Authority has the power under clause 12A of Schedule 2 of the Act to dismiss frivolous or vexatious proceedings, and may do so at any time in a proceeding where the Authority considers that matter to be frivolous or vexatious:

12A Power to dismiss frivolous or vexatious proceedings

(1) *The Authority may, at any time in any proceedings before it, dismiss a matter or defence that the Authority considers to be frivolous or vexatious.*

(2) *In such a case, the order of the Authority may include an order for payment of costs and expenses against the party bringing the matter or defence.*

[33] In *STAMS v MM Metals Ltd* (*STAMS*) [7] the Employment Court considered whether the attempt of an employee to pursue a personal grievance where a settlement agreement

[7] [1993] 1 ERNZ 115

existed was frivolous. Judge Finnegan stated:[8] "*To attempt to proceed would be frivolous, is futile."*

[34] In *New Zealand (with exceptions) Shipwrights etc Union v New Zealand Amalgamated Engineering etc IUOW & Ors*[9], Chief Judge Goddard cited with approval the words of Lush J in *Norman v Mathews*[10] in which the English Judge said that a frivolous case was one which: "*no reasonable person could properly treat as bona fide"*

[35] In *Creser v Tourist Hotel Corp of New Zealand (Cresor)* [11](Chief Judge Goddard observed[12] at 1069:

> *I would add only this: to categorise a case as frivolous it is not necessary for the Court to be able to make a positive finding that the applicant or plaintiff is trifling with the Court or is in any way insincere or moved by wrong motives. It is sufficient if, as a result of some patent and glaring error of law, the plaintiff or applicant has brought a case which is entirely misconceived.*

[36] I accept that E-Lighting has not been able to provide clear evidence that to establish that Hunza committed any act of aiding and abetting. However in *Xu*[13], the Employment Court referred to consideration of penalty actions and the ability of the Court to fill gaps in the evidence by drawing inferences: "*... the Court's broad power to receive evidence and its ability as a court of equity and good conscience to fill gaps in the evidence by drawing inferences ...*

[37] In my determination in respect of the application for an interim injunction[14] I noted the concession of the First and Second Respondents[15] that there was: "*an arguable case that their dealings with Hunza involved a breach of the duty of fidelity*"

[38] I accept that inferences regarding the claim of aiding and abetting against Hunza may be drawn from: (i) the timing of Ms Dickens' meetings with Mr Cunningham in October 2014, (ii) the timing of the meeting with Hunza on 14 January 2015, and (iii) the sworn evidence of the Second Respondent at the Investigation Meeting

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[8] Ibid at pages 10 and 11
[9] 23 November 1989, WLC111/89)
[10] [1916] 85 LJKB 857
[11] (1990) 1NZILR 1055 (LC)
[12] Ibid at 1069
[13] Ftnote 1 above
[14] [2015] NZERA 61
[15] Ibid at para [75]

[39] However I find that those inferences cannot be securely drawn in the absence of any tested evidence being taken from the First and Third Respondent, this remaining to be heard as part of the substantive investigation meeting due to resume on 14 May 2015.

[40] In the absence of that evidence I find that I cannot determine that the penalty claim by E-Lighting against Hunza will succeed, but I cannot be absolutely certain that: "*it cannot succeed*"[16] nor that at this stage do I find the claim to be: "*futile"* [17] or: "*entirely misconceived"*[18].

[41] I do not find in this case that E-Lighting's claim that Hunza had aided and abetted the First and Second Respondent in the alleged breaching of their employment agreements with E-Lighting to be frivolous.

[42] I determine that the penalty action against Hunza should not be dismissed.

Costs

[43] 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

[16] *Newick*
[17] *STAMS*
[18] *Cresor*