IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2015] NZHRRT 13**

	Reference No. HRRT 011/2013
UNDER	**THE HUMAN RIGHTS ACT 1993**
BETWEEN	**KEVIN ALLAN WATERS**
	PLAINTIFF
AND	**ALPINE ENERGY LIMITED**
	DEFENDANT

AT TIMARU – HEARING BY TELECONFERENCE

BEFORE:
Mr RPG Haines QC, Chairperson
Ms DL Hart, Member
Hon KL Shirley, Member

REPRESENTATION:
Mr KA Waters in person
Ms AL Keir for defendant

DATE OF HEARING: **17 April 2015**

DATE OF DECISION: **29 April 2015**

DECISION OF TRIBUNAL ORDERING FURTHER INFORMATION BE PROVIDED TO PLAINTIFF[1]

Background

[1] In *Waters v Alpine Energy Ltd (Discovery No. 2)* [2015] NZHRRT 7 (9 March 2015) the Tribunal ordered Alpine Energy Ltd (Alpine Energy) to provide Mr Waters with certain documents previously withheld by Alpine Energy during the discovery process. Each of the documents, however, was to be provided with parts redacted. Alpine Energy has provided the redacted documents as ordered.

[1] [This decision is to be cited as: *Waters v Alpine Energy Ltd (Discovery No. 3)* [2015] NZHRRT 13]

[2] On 16 March 2015 Mr Waters gave notice that having seen the redacted documents he sought disclosure of "the total remuneration package" which Alpine Energy agreed to pay the person appointed to the position for which Mr Waters had applied. Although Mr Waters later expanded this request to include "the March 2012 normal total remuneration ranges based on respective employees remunerations around that time", the particular point was not pursued, Mr Waters advising the Tribunal on 17 April 2015 he would collect the information from publicly available sources.

[3] On 17 April 2015 a hearing was convened by teleconference for the full Panel to hear the application and the submissions by Alpine Energy in opposition.

The submissions by Mr Waters

[4] The straightforward submission made by Mr Waters is that the salary package of the successful applicant is relevant to the question whether age discrimination occurred. As we understand his argument, it is not just a question whether the successful candidate was "best qualified, younger and cheaper" but also whether the candidate was "less qualified, younger and more expensive". In either scenario, Mr Waters argues, the remuneration offered to the appointee is of relevance to the question whether Mr Waters was discriminated against on the grounds of his age.

[5] Mr Waters acknowledges that at the hearing at Timaru on 9 March 2015, when asked by the Tribunal whether the remuneration offered to the successful candidate was relevant to the way in which he intended advancing his case, he had answered "No. He explains he had not at that point seen the redacted documents which the Tribunal subsequently ordered be provided to him and only after seeing the new evidence did he appreciate the potential relevance of the remuneration package to his case. In addition the question posed by the Tribunal had caught him by surprise and he had had insufficient time to consider its implications.

The submissions for Alpine Energy

[6] Alpine Energy opposes the application on three grounds:

> **[6.1]** The Tribunal has no jurisdiction to consider the application either as an application for further discovery or as a challenge to the Tribunal's decision given on 9 March 2015.
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> **[6.2]** Even if the Tribunal has jurisdiction to order release of the information, it should not be released because it is not relevant.
>
> **[6.3]** Even if the information is relevant it should not be released in exercise of the discretion in s 69 of the Evidence Act 2006.

[7] As to jurisdiction, reliance was placed on the principle of finality in litigation and the absence of any provision which would allow the Tribunal to recall or correct a judgment. Even if there was jurisdiction to modify the decision of 9 March 2015 there were no exceptional grounds justifying such modification. While the documents had been withheld from Mr Waters, Mr Waters should have appreciated the document in question contained salary information as the discovery schedule described the document as "letter of offer". It was also submitted the application for salary information was an attempt to retract the statement made at the hearing on 20 February 2015 that the question of salary did not form part of Mr Waters' case.

[8] As to relevance, it was submitted the expansion of relevance from "younger and cheaper" to "younger but more expensive" demonstrated Mr Waters was endeavouring to challenge the rate of pay to the successful applicant, not establish discrimination on the grounds of age. It was argued his desire to learn the rate of remuneration was motivated more by historical concerns relating to his rate of pay when employed by Alpine Energy than by a genuine belief a salary of more than $65,000 would prove he was discriminated against on the basis of age. In the alternative, it was submitted even were Mr Waters' motivation genuine, it would be difficult to determine the significance of the salary information without a comparator. In essence, the submission for Alpine Energy is that the salary offered to the successful applicant will not be of any assistance in determining whether Mr Waters suffered discrimination because of his age.

[9] As to the discretion in s 69 of the Evidence Act, reference was made to the need for the Tribunal to engage in the statutory balancing exercise mandated by this provision. Attention was also drawn to a small column published in the *Timaru Herald* on 22 March 2015 briefly reporting the case. The report relevantly stated:

> In a March 9 decision, the tribunal gave formal orders that the CV and correspondence between Alpine Energy and the successful applicant, Jan Nicholas Carter, be disclosed to Waters. The case now moves back to the Timaru District Court and will be held on September 14 – 17.

[10] It was submitted Mr Carter's unwitting involvement in these proceedings is now common knowledge in the Timaru community and "many of his concerns" expressed in his High Court affidavit have been realised. It is argued his salary is confidential information and that his public exposure is an important factor in balancing whether the information should be made available. The discretion should continue to weigh against release of the information.

DISCUSSION

Jurisdiction

[11] The contention by Alpine Energy that the Tribunal has no jurisdiction to reopen the decision given on 9 March 2015 is misconceived:

> **[11.1]** The application by Mr Waters for access to remuneration information is a new application and the Tribunal has not in any of its previous rulings addressed the issue. The application could only have been made **after** Mr Waters received the redacted documents released as a consequence of the ruling of 9 March 2015.
>
> **[11.2]** Discovery is a unique, continuing process. In the language of High Court Rules, r 8.18, there is a continuing obligation to give discovery. A ruling given on one aspect of discovery does not inhibit the giving of a ruling on a different aspect. What Mr Waters is seeking is a ruling on a fresh issue, not the recall, reopening or revisiting of the 9 March 2015 ruling. Once the redacted documents had been provided he was fully entitled to seek such further and better discovery as might then be appropriate in the light of the new information found in the previously withheld documents.

[12] As to the submission Mr Waters is, in effect, bound irreversibly by his response to the Tribunal's question whether remuneration was relevant to the way in which he intended advancing his case, account must be taken of the following:

[12.1] When the question was put Alpine Energy and the Tribunal had seen the closed documents. Mr Waters had not.

[12.2] Mr Waters is a litigant in person who was faced with an unanticipated question, did not know the contents of the closed documents and did not know whether they would be provided to him. Caught by surprise he offered a response which was honestly given at the time but which, with the benefit of hindsight, was wrong.

[13] In these circumstances we believe it would be both unjust and unfair for Mr Waters to be bound by an extemporé decision on litigation strategy. Section 105 of the Human Rights Act 1993 enjoins the Tribunal to avoid technicalities and to act in a manner that is fair and reasonable. Given the factors outlined above and the terms of this provision we do not accept there is any want of jurisdiction to hear and determine this application for further and better discovery.

Relevance

[14] As to relevance, Mr Waters submits (inter alia) the evidence sought goes to the question whether his application was disregarded by an employer who lowered the qualification requirements to "entry level" and then appointed a less qualified, younger candidate at a higher salary rate. Such scenario, if established, could support his contention he was not appointed to the position because of his age. When the "younger but cheaper" scenario was put by the Tribunal to Mr Waters at the hearing on 20 February 2015 it was not intended by the Tribunal to be anything more than an inquiry whether remuneration was then part of Mr Water's case. When he answered in the negative, it was a response made without the benefit of reflection or of the documents Mr Waters now has. We see no basis for the submission by Alpine Energy that Mr Waters' motivation in wanting to learn the rate of remuneration is "his historical concerns" about his rate of pay when earlier employed by Alpine Energy. The further submission that any salary issue is in any event of no assistance is possibly misplaced, as is the submission Mr Waters must first establish a comparator. These issues are for determination in the context of the substantive hearing, not in the course of the discovery process.

The discretion as to confidential information

[15] We address now s 69 of the Evidence Act 2006 which provides:

> **69 Overriding discretion as to confidential information**
>
> (1) A *direction under this section* is a direction that any 1 or more of the following not be disclosed in a proceeding:
> (a) a confidential communication:
> (b) any confidential information:
> (c) any information that would or might reveal a confidential source of information.
> (2) A Judge may give a direction under this section if the Judge considers that the public interest in the disclosure in the proceeding of the communication or information is outweighed by the public interest in—
> (a) preventing harm to a person by whom, about whom, or on whose behalf the confidential information was obtained, recorded, or prepared or to whom it was communicated; or
> (b) preventing harm to—
> (i) the particular relationship in the course of which the confidential communication or confidential information was made, obtained, recorded, or prepared; or
> (ii) relationships that are of the same kind as, or of a kind similar to, the relationship referred to in subparagraph (i); or
> (c) maintaining activities that contribute to or rely on the free flow of information.

(3) When considering whether to give a direction under this section, the Judge must have regard to—
  (a) the likely extent of harm that may result from the disclosure of the communication or information; and
  (b) the nature of the communication or information and its likely importance in the proceeding; and
  (c) the nature of the proceeding; and
  (d) the availability or possible availability of other means of obtaining evidence of the communication or information; and
  (e) the availability of means of preventing or restricting public disclosure of the evidence if the evidence is given; and
  (f) the sensitivity of the evidence, having regard to—
    (i) the time that has elapsed since the communication was made or the information was compiled or prepared; and
    (ii) the extent to which the information has already been disclosed to other persons; and
  (g) society's interest in protecting the privacy of victims of offences and, in particular, victims of sexual offences.
(4) The Judge may, in addition to the matters stated in subsection (3), have regard to any other matters that the Judge considers relevant.
(5) A Judge may give a direction under this section that a communication or information not be disclosed whether or not the communication or information is privileged by another provision of this subpart or would, except for a limitation or restriction imposed by this subpart, be privileged.

[16] There are two important public interest factors weighing in favour of disclosure:

[16.1] The right to be free from discrimination. This right underpins almost every aspect of human rights law both internationally and in New Zealand domestic law. It is a right explicitly recognised by s 19 of the New Zealand Bill of Rights Act 1990 and the enforcement mechanism is provided by the Human Rights Act. The public interest in combating discrimination is of the highest kind.

[16.2] There is a compelling public interest in ensuring the Tribunal is able to get at the truth so that justice may be done between the parties. See by analogy *Riddick v Thames Board Mills Ltd* [1977] QB 881 at 895-896. Experience shows the discovery process is essential for the achievement of this objective.

[17] To these factors must be added:

[17.1] While the privacy interests of non-parties to litigation are relevant factors to be taken into account in the discovery process (see for example s 69 of the Evidence Act), such interests do not trump the overriding need for the court or tribunal to get at the truth. This is demonstrated by the fact the law makes specific provision for the obtaining of discovery against those who are not even parties to the proceedings. See High Court Rules, r 8.21.

[17.2] The Tribunal is required by statute to go about its work in public except in special circumstances. See s 107 of the Human Rights Act.

[17.3] Confidentiality concerns can be addressed by different mechanisms, depending on the strength of the privacy interest in issue. For example, limiting inspection (see High Court Rules, r 8.28(3)) and the undertaking as to use of the document (refer High Court Rules, r 8.30(4)). As to such undertaking we refer to the judgment of Rodney Hansen J in *Telstra New Zealand Ltd v Telecom New Zealand Ltd* (2000) 14 PRNZ 541 at [47] and [48]:

> [47] It was agreed that the terms of the express undertaking did not differ materially from the terms in which the implied undertaking is customarily expressed. The implied undertaking is, however, an undertaking to the Court imposed by operation of law by

virtue of the circumstances in which the documents are obtained: *Taylor v Serious Fraud Office* [1999] 2 AC 177, 207; *Crest Homes plc v Marks* [1987] 1 AC 829, 853 (HL). The rationale for the undertaking was put this way by Lord Denning in *Riddick v Thames Board Mills* [1977] QB 881, 895-896; [1977] 3 All ER 677, 687:

> "The reason for compelling discovery of documents in this way lies in the public interest in discovering the truth so that justice may be done between the parties …
>
> Compulsion is an invasion of a private right to keep one's documents to oneself. The public interest in privacy and confidence demands that this compulsion should not be pressed further than the course of justice requires. The courts, therefore, should not allow the other party, or anyone else, to use the documents for any ulterior or alien purpose. Otherwise the courts themselves would be doing injustice … In order to encourage openness and fairness, the public interest requires that documents disclosed on discovery are not to be made use of except for the purpose of the action in which they are disclosed. "

[48] The undertaking is sometimes expressed in the negative, not to use the documents for any ulterior, alien or collateral purpose, but often as a positive obligation to use discovered documents only for a particular purpose. That purpose was said in *Taylor* to be "the conduct of the litigation" (at p 207), in *Crest Homes* "the proper conduct of that action on behalf of his client" (at p 853) and frequently as "the purposes of the proceedings in which they are disclosed": see most recently in *Bourns Inc v Raychem Corp* [1999] 3 All ER 154, 169.

[17.4] In the present case Mr Waters has given an undertaking in the following terms:

> I, Kevin Allan Waters, hereby expressly acknowledge that the documents received by me from Alpine Energy and Farrow Jamieson in the course of my proceedings before the Human Rights Review Tribunal in HRRT011/2013 may be used for the purpose of those proceedings only and except for the purposes for those proceedings, I will not make them available to any other person without leave of the Chairperson of the Tribunal (unless the document has been read out in open court).
>
> I undertake to maintain the confidence of the documents, to store them securely and to return or destroy copies after the final determination of these proceedings.

[17.5] There is no evidence whatever Mr Waters has or will breach this undertaking.

[18] As against these factors Alpine Energy relies on the following:

[18.1] The salary earned by an individual can be a sensitive issue and at least in the private sector, is commonly regarded as a matter confidential to the employee and employer.

[18.2] The successful applicant (Mr Carter) is strongly opposed to the disclosure. In an affidavit sworn on 20 May 2014 and filed in the High Court proceedings he deposed to his belief that because Timaru is a small town and his profession close-knit, it would prove very difficult to edit his personal information in a way that would protect his privacy.

[18.3] The submissions for Alpine Energy contend (without giving particulars) "[m]any of Mr Carter's concerns, expressed in his affidavit and referred to the Tribunal have been realised".

[19] As to the foregoing, we remain of the view expressed in our decision given on 9 March 2015 that there is no persuasive evidence any harm will be caused to Mr Carter were the Tribunal to order release to Mr Waters of the salary offered to Mr Carter in April

2012. Such release does not put the salary into the public domain. The submission for Alpine Energy that many of Mr Carter's concerns have been realised is not supported by the evidence. At most, all that is established is that in a brief report of the case published by the *Timaru Herald* on 22 March 2015 Mr Carter is mentioned as the successful appointee. This fact is hardly confidential information and does not breach any privacy interest.

[20] In our view Mr Carter's privacy interests can be adequately protected by:

> **[20.1]** Making no reference in this decision to the salary offered to him in April 2012.
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> **[20.2]** The express undertaking given by Mr Waters.

[21] The salary information may or may not be referred to during the course of the substantive hearing. If it is and if there are proper grounds for so doing, the Tribunal can make an order under s 107 of the Human Rights Act prohibiting publication of that specific information.

[22] On weighing the competing interests we are of the clear view the two documents in question must be released to Mr Waters without redaction as to salary details. Specifically:

> **[22.1]** In relation to the letter of offer dated 16 April 2012 from Alpine Energy to Mr Carter, the third sentence beginning "Total" and ending "annum" is to be provided to Mr Waters without redaction. This means that apart from the address to which the letter was sent, the letter is to be re-released to Mr Waters in its entirety and without redaction.
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> **[22.2]** In relation to the letter of acceptance dated 23 April 2012 from Mr Carter to Alpine Energy, this document is to be re-released to Mr Waters in the form described in the Tribunal's decision of 9 March 2015 at [25], [26] and [27] except that the handwritten note at the foot of the first page commencing "Make" and ending "above" is no longer to be redacted.

FORMAL ORDERS

[23] For the reasons given our formal orders are:

> **[23.1]** The letter dated 16 April 2012 from Alpine Energy to Mr Carter is to be re-released to Mr Waters once it has been redacted to comply with the terms of this decision.
>
> **[23.2]** The letter dated 23 April 2012 from Mr Carter to Alpine Energy is to be re-released to Mr Waters once it has been redacted to comply with the terms of this decision.
>
> **[23.3]** Should either party require clarification about any part of this decision and in particular which parts of the two documents are to be redacted, application can be made to the Chairperson who will provide the clarification sought.
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> **[23.4]** The redacted documents are to be provided to Mr Waters within five working days of the date on which this decision is delivered.

Future conduct of case

[24] The timetable directions given in our decision dated 9 March 2015 are in need of enlargement given the interruption caused by the hearing on 17 April 2015 and the need for the terms of this present decision to be implemented.

[25] Consequently new timetable directions follow.

Case management directions

[26] The following directions are made:

> **[26.1]** Written statements of the evidence to be called at the hearing by Mr Waters are to be filed and served by 5pm on Friday 22 May 2015. By the same date Mr Waters is to provide Ms Keir with a list of documents Mr Waters wishes to have included in the common bundle of documents.
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> **[26.2]** Written statements of the evidence to be called at the hearing by Alpine Energy are to be filed and served by 5pm on Friday 19 June 2015. By the same date Ms Keir is to provide Mr Waters with a list of documents Alpine Energy wishes to have included in the common bundle of documents.
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> **[26.3]** Should Mr Waters wish to file any statements in reply, such statements are to be filed and served by 5pm on Friday 3 July 2015.
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> **[26.4]** In consultation with Mr Waters, Ms Keir is to prepare the common bundle of documents and that bundle is to be filed and served by 5pm on Friday 17 July 2015.
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> **[26.5]** The proceedings are to be heard at Timaru on 14, 15, 16 and 17 September 2015 at the Timaru District Court.
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> **[26.6]** If for any unforeseen reason these case management directions need to be revisited application can be made to the Chairperson. Leave is reserved to both parties to make further application should the need arise.

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Mr RPG Haines QC	**Ms DL Hart**	**Hon KL Shirley**
Chairperson	**Member**	**Member**