IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2015] NZHRRT 17**

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

AT TIMARU – HEARING BY TELECONFERENCE

TRIBUNAL: Rodger Haines QC, Chairperson

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

DATE OF MINUTE: 29 May 2015

MINUTE OF CHAIRPERSON DECLINING APPLICATION BY DEFENDANT FOR ADJOURNMENT[1]

Introduction

[1] The substantive hearing is scheduled to commence at the Timaru District Court on Monday 14 September 2015. Four days have been set aside.

[2] The operative version of the case management timetable is presently found in the Tribunal's decision given on 29 April 2015 (*Waters v Alpine Energy Ltd (Discovery No. 3)* [2015] NZHRRT 13 (29 April 2015). Mr Waters was required to file his evidence by Friday 22 May 2015. Written statements of the evidence to be called at the hearing by Alpine Energy Ltd (Alpine Energy) are due by Friday 19 June 2015.

[3] Ahead of time, Mr Waters on Wednesday 20 May 2015, filed (inter alia):

[3.1] A 74 page document setting out his evidence and submissions.

[1] [This decision is to be cited as: *Waters v Alpine Energy Ltd (Adjournment Application)* [2015] NZHRRT 17]

[3.2] An affidavit sworn on 20 February 2015 by Mr JR Robertson together with a signed statement by Mr Robertson dated 14 May 2015.

[3.3] A "will say" statement by Mr G McNabb of Kaiapoi.

[3.4] A "will say" statement by Mr A Sullivan, of Temuka.

Mr Waters says neither Mr McNabb nor Mr Sullivan wish to give evidence at the hearing.

The adjournment application

[4] By memorandum dated 25 May 2015 Ms Keir applied for an adjournment until some time in 2016. It is not intended to recite at length the contents of the memorandum. The essential ground of the application is that the "will say" statements by Mr McNabb and Mr Sullivan do not fully and fairly give notice of the evidence which the two witnesses will in fact give at the hearing. A further ground is that it is not clear whether Mr McNabb and Mr Sullivan will even appear at the hearing.

[5] Complaint is also made of the fact that applications for witness summonses have not been made in respect of either of these witnesses even though the Tribunal has on more than one occasion explained to Mr Waters the procedure by which a witness summons can be obtained from the Tribunal. It is implicit in the submissions for Alpine Energy that Alpine Energy anticipated the process by which Mr Waters would apply for witness summonses should have been completed prior to 22 May 2015 and that Alpine Energy had a right to be heard on any such application. As a result, there have been two consequences:

[5.1] The failure of Mr Waters to apply for witness summonses in respect of Mr McNabb and Mr Sullivan means Alpine Energy is not able to complete the preparation of its evidence because it does not yet know if it will be required to address evidence from either Mr McNabb or Mr Sullivan.

[5.2] The process of applying for witness summonses will take "a number of weeks and maybe longer". Only after this process has been completed will Alpine Energy be able to finalise its evidence. It will certainly not be able to do so before the deadline of 19 June 2015.

Application opposed by Mr Waters

[6] Mr Waters opposes the adjournment application, pointing out these proceedings were filed on 17 June 2013 and relate to events in early 2012. He says that these now protracted proceedings have taken a significant toll on his time, well-being and quality of life and wishes to avoid any further delay. He also points out that when filing his papers he did by email dated 20 May 2015 apply for witness summonses addressed to Mr McNabb and Mr Sullivan.

DISCUSSION

The witness summons question

[7] As mentioned, the submissions for Alpine Energy proceed on the basis that Alpine Energy expect any application by Mr Waters for a witness summons to be on notice to Alpine Energy and that Alpine Energy has a right to oppose the application, necessitating a formal hearing by the Tribunal. The memorandum by Ms Keir refers to this being "in accordance with the usual process". It was said the process of applying for

a witness summons would take "a number of weeks and maybe longer". Such process ought to have been completed by the 22 May 2015 deadline for Mr Waters to file his evidence.

[8] As to this, there are two points.

[9] First, none of the case management directions given by the Tribunal in its various decisions and none of the directions given by me as Chairperson by Minute have stipulated that any application by Mr Waters for a witness summons must be heard and determined on or before the deadline for the filing of his evidence. Second, neither the decisions nor the *Minutes* have suggested Alpine Energy has a right to be heard on an application by Mr Waters for a summons.

[10] Ms Keir made specific reference to the *Minute* issued by me on 19 December 2014. However, there is nothing in that *Minute* to support the contentions made by Alpine Energy. The relevant paragraphs from the *Minute* follow:

> **Obtaining a witness summons**
>
> **[26]** Under s 109 of the Human Rights Act 1993 the Tribunal, on the application of any party to the proceedings, may issue a witness summons to any person requiring that person to attend before the Tribunal to give evidence at the hearing of the proceedings:
>
> > **109 Witness summons**
> >
> > (1) The Tribunal may, if it considers it necessary, of its own motion, or on the application of any party to the proceedings, issue a witness summons to any person requiring that person to attend before the Tribunal to give evidence at the hearing of the proceedings.
> > (2) The witness summons shall state—
> > (a) the place where the person is to attend; and
> > (b) the date and time when the person is to attend; and
> > (c) the papers, documents, records, or things which that person is required to bring and produce to the Tribunal; and
> > (d) the entitlement to be tendered or paid a sum in respect of allowances and travelling expenses; and
> > (e) the penalty for failing to attend.
> > (3) The power to issue a witness summons may be exercised by the Tribunal or a Chairperson, or by any officer of the Tribunal purporting to act by the direction or with the authority of the Tribunal or a Chairperson.
>
> **[27]** Before issuing a witness summons the Tribunal will need to be satisfied that the person can give material evidence and for that reason a written application supported by a "will say" statement of evidence is usually required. The application must establish proper grounds for the Tribunal to issue a summons.
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> **[28]** The party applying for the summons is responsible for its service once it has been issued by the Tribunal.
>
> **[29]** It is to be noted that s 111 of the Human Rights Act provides that every witness attending before the Tribunal to give evidence pursuant to a summons is entitled to be paid witnesses' fees, allowances and travelling expenses and when issuing a summons under s 109(1) the Tribunal is required to fix the amount which, on the service of the summons, must be paid or tendered to the witness. Payment is to be made by the party applying for the witness summons. The payments a witness is entitled to are those set out in the Schedule to the Witnesses and Interpreters Fees Regulations 1974. Both these Regulations and the Human Rights Act itself can be accessed on the New Zealand legislation website www.legislation.govt.nz.

[11] There is nothing in ss 109 to 111 of the Human Rights Act 1993 which would suggest an opposing party has a right to be heard when the other party applies for a witness summons. Ordinarily, each party has an unqualified right to determine which witnesses to call and how the attendance of those witnesses at the hearing is to be

secured. Some witnesses attend voluntarily, some attend voluntarily but require a witness summons, others refuse to attend at all making a witness summons essential.

[12] Ms Keir was unable to cite any provision in the analogous High Court Rules which confers on one party a right to be heard on an application by the other party for a witness summons. Nor was any case law cited in support.

[13] The High Court Rules, r 9.52 (Issue of subpoenas) in fact provides that orders of subpoena may be obtained "by any party, at any time" after the filing of the statement of claim. While a party requiring the issue of an order of subpoena must file a written request to obtain it, a Registrar "must forthwith issue the order" upon receipt of the request:

> **9.52 Issue of subpoenas**
>
> (1) Orders of subpoena in form G 25 to require the attendance of witnesses at the trial to testify or to produce documents, or both, may be obtained by any party, at any time after the filing of the statement of claim.
> (2) A party requiring the issue of an order of subpoena must file a written request to obtain it.
> (3) The names of more than 1 witness may be included in an order of subpoena, but it is not necessary to show the names on the written request.
> (4) Upon receiving a written request under this rule the Registrar must forthwith issue the order or orders of subpoena requested.

[14] Although subpoenas are issued administratively from a Registry, the court can control cases of abuse and prevent wrongful use of subpoenas by setting them aside. See *Re Golightly* [1974] 2 NZLR 297 and the commentary in *McGechan on Procedure* (online looseleaf ed, Brookers) at [HR9.52.09].

[15] Under the Human Rights Act control over abuse is found in the stipulation in s 109(3) that a summons can only be issued by the Tribunal, the Chairperson or by an officer of the Tribunal acting by the direction or with the authority of the Tribunal or Chairperson. The practice is to require a written application supported either by a signed witness statement or by a "will say" statement to enable the Tribunal or Chairperson to be satisfied there are proper grounds for the issue of the summons and to prevent abuse or wrongful use of the summons. The discretion notwithstanding, natural justice and a fair hearing require that a party should have every reasonable opportunity to present evidence in support of his or her case. See *Chee v Stareast Investment Ltd* HC Auckland CIV-2009-404-005255, 1 April 2010 (Wylie J) at [60]:

> [60] Notwithstanding this, the Tribunal should be slow to exercise its discretion against a claimant seeking a witness summons unless the summons is likely to be oppressive or an abuse of the Tribunal's hearing processes. This could arise where, for example, the evidence likely to be adduced from the prospective witnesses is unnecessary or irrelevant, where the witness cannot have any knowledge of the matter, or where the summons is sought for a collateral purpose. These examples are not meant to be exhaustive. Otherwise, natural justice and the need for a fair hearing require that a party should have every reasonable opportunity to present evidence in support of his or her case. This may well require that the Tribunal issue a witness summons so that the appropriate evidence is available.

[16] I can see nothing in the present application or in the "will say" statements which could even in the most remote way suggest abuse or support a claim by Alpine Energy that in the particular circumstances of the case, it should be heard.

[17] As a witness summons can be obtained at any time there is no merit to the further claim by Alpine Energy that it had to know by 22 May 2015 (the cut-off point for Mr Waters to file his evidence) whether summonses had been issued to one or more of Mr Waters' intended witnesses. There is no "right" for Alpine Energy to know, in advance of

the hearing, whether Mr Waters has applied for a summons or whether one or more have been issued. The only statutory requirement in s 110 of the Human Rights Act is that the summons be served at least 24 hours before the attendance of the witness is required (if the summons is delivered personally to the person summonsed) or 10 days before the date of attendance where service is by registered letter.

"Hostile witnesses" and the claim Alpine Energy does not know with certainty what evidence is to be given by Mr McNabb and Mr Sullivan

[18] The submissions for Alpine Energy made much of the fact that Mr Waters describes both Mr McNabb and Mr Sullivan as "hostile witnesses". I have difficulty in seeing how the adjective adds anything to the strength of the adjournment application. It is clear from the "will say" statements and from the associated correspondence received by the Tribunal from Mr Waters that he has spoken to both witnesses and has set out in the "will say" statements his understanding of what the witnesses will say favourable to his case. Hopefully Mr Waters is aware witnesses can also give evidence unfavourable to the party calling them and in that event the party calling can only in limited circumstances challenge the veracity of the witness. Without a signed statement of evidence the risk an uncooperative witness will give unfavourable evidence is potentially high.

[19] Be that as it may, it is clear that the term "hostile witness" as used by Mr Waters means a witness who will not appear at a hearing without a witness summons. Lawyers would usually understand the term somewhat differently but little point is served by engaging in a semantic analysis.

[20] The important point is that for both Mr McNabb and Mr Sullivan it has been possible for Mr Waters to give a clear, succinct resume of what he believes will be said by them in evidence. It follows Alpine Energy has enough information in the "will say" statements to know what case it must meet (assuming the witnesses come up to their "will say" statements). That Alpine Energy does understand the essential points Mr Waters hopes to establish through the two witnesses is demonstrated by the fact that Ms Keir provided the following abstract in her submissions:

> (a) Mr McNabb acted as a referee for the plaintiff in his application for positions with the defendant. It has been suggested in previous documents (although not in the current will say statement) that Mr McNabb will challenge the account of his reference given verbally to the defendant's recruitment agency;
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> (b) Mr Sullivan is alleged to be a member of the "selection panel" for the Engineering Officer – New Connections position, and will give evidence of a preference for an employee younger than the plaintiff. He will apparently explain the selection criteria applied by the defendant.

[21] The complaint by Alpine Energy is that because it does not know "with certainty" exactly what each witness will say, no response can be prepared.

[22] In my view the difficulty is more imagined than real:

> **[22.1]** No signed witness statement (and indeed sworn affidavit) guarantees with certainty what a witness will say either in evidence in chief or in cross-examination. It is difficult to understand why different rules should apply where a party has been forced to file a "will say" statement because the intended witness refuses to provide a statement.

[22.2] It is not unknown for a party to apply for a witness summons in relation to a witness who will not even speak to the calling party. The first time either the calling party or the opposing party will learn of the witness' evidence will be when the oath is taken and the witness questioned. The mere fact that no witness statement is made available in advance of the hearing does not disqualify the witness from giving evidence or the calling party from presenting the witness. The "will say" statements provided by Mr Waters substantially mitigate these difficulties and it is clear Alpine Energy understands the gist or substance of what Mr Waters hopes to gain from the witnesses.

[22.3] Because there is no property in a witness, Alpine Energy is free to approach both Mr McNabb and Mr Sullivan (who was an employee of Alpine Energy until he retired in January 2014) to ascertain whether the "will say" statements provided by Mr Waters will be a true reflection of their evidence.

[22.4] If during the hearing Alpine Energy can establish a real risk of prejudice arising from unanticipated evidence given by Mr McNabb or Mr Sullivan, a request can be made either for a short adjournment or for the proceedings themselves to be adjourned into the future. The key elements will be surprise and prejudice.

[22.5] Account must also be taken of the fact Mr Waters has filed what can only be described as a detailed and compendious document setting out both his evidence and submissions. Alpine Energy can hardly be in any doubt as to how he intends to present his case and how the intended evidence of Mr McNabb and Mr Sullivan is integrated into that case. Mr Waters is prepared to take the risk of calling two witnesses who have not been entirely cooperative. That, however, is his right.

Conclusion

[23] Alpine Energy has failed to establish a real risk of prejudice going into a hearing with the present "will say" statements by Mr McNabb and Mr Sullivan. Given the fullest of disclosures made by Mr Waters, the absence of prejudice to Alpine Energy and the fading of witness memories, I have little hesitation in declining the adjournment application. It is dismissed.

"Rodger Haines"

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Rodger Haines QC
Chairperson
Human Rights Review Tribunal